

United States
Circuit Court of Appeals

For the Ninth Circuit.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Appellant,

vs.

EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKEY, as Receiver for THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, and DOWNIE D. MUIR,

Appellees.

Transcript of Record.

VOLUME I.

(Pages 1 to 384, Inclusive.)

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1

Filed

JUL 1 - 1916

E. D. Mendon

United States
Circuit Court of Appeals
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ALASKA JUNEAU GOLD MINING COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the District of Alaska, Division Number One.

No. 1074-A.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

THE EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKEY, as Receiver of the ALASKA-EBNER GOLD MINES COMPANY and DOWNIE D. MUIR,

Defendants in Error.

Names and Addresses of Attorneys of Record.

HELLENTHAL & HELLENTHAL, Juneau,
Alaska,

Attorneys for Plaintiff in Error.

WINN & BURTON, Juneau, Alaska,

Attorneys for Defendants in Error.

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

#1074-A.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, THE ALASKA-EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver of the ALASKA-
EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

Complaint.

The plaintiff complains of the defendants and
alleges:

I.

That the plaintiff is a corporation duly organized
and existing under and by virtue of the laws of West
Virginia and doing business in the Territory of
Alaska with its principal place of business at Ju-
neau; that the plaintiff has paid the license fee for
the year 1913 and the annual license due January 1,
1914, for the year 1914, as provided for by chapter
eleven (11) of the 1913 Session Laws of the Territory
of Alaska, and is authorized to sue in the Territory
of Alaska.

II.

That the defendant, Ebner Gold Mining Company,

is a corporation duly organized and existing and doing business in the Territory of Alaska.

III.

That the defendant, Alaska-Ebner Gold Mines Company [*1] is a corporation duly organized and existing and doing business in the Territory of Alaska.

IV.

That the defendant, Angus Mackey, was duly and regularly appointed, on the 29th day of June, 1912, by an order of this Court made and entered in the case of Valdemar T. Hammer, plaintiff, vs. Alaska-Ebner Gold Mines Company, defendant, an action then pending in this court as case No. 928-A, as receiver for the Alaska-Ebner Gold Mines Company, and did on the first day of July, 1912, take his oath of office, and in all respects duly qualify as such receiver, and is now the duly acting and qualified receiver for the Alaska-Ebner Gold Mines Company; and that leave of Court has been duly obtained to sue him as such receiver.

V.

That Gold Creek is a natural stream of water, having its source in the mountains situate above Silver Bow Basin, a few miles easterly from the town of Juneau, Alaska, from whence it flows through a series of basins and canyons in a westerly direction into Gastineau Channel, an arm of the Pacific Ocean, collecting the waters of various small streams and tributaries along its course.

*Page-number appearing at foot of page of original certified Record.

VI.

That on the first day of August, 1910, the waters of Gold Creek were flowing in their natural channel, unappropriated, unused, and unclaimed, at the point of the diversion and appropriation hereinafter more particularly [2] designated; that on the said first day of August, 1910, while the said waters of Gold Creek were flowing in the natural channel, as aforesaid, one L. D. Mulligan, who was acting in that behalf, as the agent and employee and representative of the plaintiff corporation, the necessary preliminary surveys and observations having been made, located, claimed and appropriated twenty thousand (20,000) miner's inches of the waters so flowing in Gold Creek, at the point of diversion hereinafter referred to: Said waters so appropriated to be used in connection with the mining and milling of ores from the plaintiff's mine in the manner hereinafter more specifically alleged; and did then and there, acting for and on behalf of plaintiff as aforesaid, post a notice on the right-hand bank of Gold Creek, going up stream, at a point near where the dam of the plaintiff has since been constructed and is now maintained, the same being approximately one mile easterly and up stream from the town of Juneau, and a short distance up stream from the portal of the Alaska-Juneau Gold Creek tunnel, situate on the Colorado lode mining claim, which said notice of appropriation is in words and figures as follows, to wit:

KNOW ALL MEN BY THESE PRESENTS:
That, I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years,

have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice posted on a tree, [3] and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910.

Which said above notice was on the 8th day of August, 1910, duly and regularly recorded in the office of the recorder for the Juneau Recording District, which said Recording District embraces the territory through which Gold Creek flows.

VII.

That the said L. D. Mulligan affixed his own name to said notice of appropriation (whereas he was, in truth and in fact, acting as agent and representative of the plaintiff in that behalf); whereupon the said L. D. Mulligan, in order to place the legal and record title, to the rights acquired by him, in the plaintiff, made, executed and delivered to the plaintiff, on the 2d day of August, 1910, his certain deed, conveying to the plaintiff all his right, title and interest, in and to the rights acquired under and by virtue of the steps taken by him as aforesaid.

VIII.

That thereafter and on the 8th day of May, 1911, the plaintiff posted an amended notice of appropriation at or near the point of diversion hereinafter

more particularly designated and described, which said amended notice of appropriation is in words and figures as follows, to wit: [4]

NOTICE IS HEREBY GIVEN, that, whereas, the Alaska-Juneau Gold Mining Company did, by its agent, L. D. Mulligan, *posting* a notice claiming and appropriating 20,000 inches of water from the waters flowing in Gold Creek, which notice is in words and figures as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States and over the age of twenty-one years, have appropriated and claimed 20,000 miner’s inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st., 1910.”

And, whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue of such agency and by *by* virtue of conveyances from said Mulligan:

Now, therefore, the undersigned, not waiving any of its rights or abandoning any of the rights belonging to it under and by virtue of said above-described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done pur-

suant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice, and of the means whereby the same is to be conveyed to such place of intended use, hereby posts and records this additional and amended notice of appropriation of water, and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original notice as well as this amended notice 20,000 miner's inches of the waters of Gold Creek measured under a four-inch pressure for mining, milling, power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold Creek about one mile and one-eighth ($1/8$) above the town of Juneau about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above mentioned location notice, signed by L. D. Mulligan. [5] The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyance, along a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgenson sawmill, on the shore of Gastineau Channel, where the same is to be applied and used for the

purpose of generating power and for other purposes to be used in connection with the operation of a stamp-mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor plant at that point and for the purpose of generating power at that point; and these waters so used on said Colorado claim will be conveyed by a pipe, flume and ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary, at said last mentioned place, if used for the purpose of furnishing power at that point as above stated. The remainder of the waters carried, not used at this point at any time, to be applied in connection with the operation of the stamp-mill to be built near the Jorgenson sawmill as above stated.

NOTICE IS EXPRESSLY GIVEN, that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Mulligan or by virtue of any of the work that it has heretofore performed looking towards the diversion and appropriation of the waters of Gold Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8 day of May, 1911.

ALASKA-JUNEAU GOLD MINING
COMPANY.

By ROBT. A. KINZIE,
Agent and General Superintendent."

The above amended notice of location was on the 8th day of May, 1911, duly and regularly recorded

in the office of the recorder for the Juneau Recording District, the same being the Recording District embracing the territory through which Gold Creek flows. [6]

IX.

That on the first day of August, 1910, the plaintiff actively commenced work looking towards the diversion, appropriation and application to use of the waters of Gold Creek, referred to in the above notice of appropriation, and did, from and after said first day of August, 1910, continue said work with due diligence and without cessation or delay and did in that connection construct a flume grade and flume line from the point of diversion to a point on the Colorado lode mining claim and thence to another point on the plaintiff's millsite, situate on the shore of Gastineau Channel near what is locally known as the Jorgenson sawmill, the said points to which said flume grade and flume line were thus constructed, being the places of intended use;

That the route of said flume line extends along the hillside from the point of diversion for a short distance to the portal of a tunnel six hundred and eighty (680) feet in length, driven for use in this connection; thence through said tunnel and along the hillside above Jualpa Basin a distance of 3,183 feet until it reaches the portal of the Alaska-Juneau #3 Tunnel through which it passes for a distance of about 2400 feet to a point on the Gastineau side of Mount Roberts, from whence the flume line extends along the said Gastineau side of Mount Roberts to the plaintiff's millsite;

That the work carried on in connection with the driving of said tunnel, the grading of said flume grade and the construction of said flume was carried on diligently and without cessation or delay from the time that said [7] work was commenced on August 1, 1910, until the same was fully completed at a cost of approximately seventy-four thousand one hundred thirty-one 09/100 (\$74,131.09);

That on October 3, 1910, the work done as above stated, looking toward the diversion and the application of the water being appropriated, had been carried on to such an extent that a dam had been construed across Gold Creek at the point of intended diversion, the same being the point where the plaintiff's dam is now maintained, and the waters of Gold Creek, to the extent of approximately five thousand (5,000) miner's inches, diverted from the natural channel of the creek; and that on or about the 17th day of November, 1910, the work above referred to had been carried on to a sufficient extent to enable the plaintiff to convey the water, so diverted, from the point of diversion aforesaid to a point on the Colorado claim so as to apply the same in connection with the operation of a compressor plant there situated, used to furnish power and compressed air for use in connection with the plaintiff's mining operations, and the said waters of Gold Creek, diverted as aforesaid, were then and there conveyed through the flume constructed as aforesaid and applied to use in connection with the driving of said compressor, it being one of the bene-

ficial uses designed; and have been so diverted, conveyed and applied, at all times since, except that a portion of the waters so diverted and conveyed were during the summer of 1913 conveyed to and applied upon plaintiff's millsite, as hereinafter stated, until the waters of Gold Creek were wrongfully diverted [8] by the defendants as herein complained of and the plaintiff deprived of the use thereof.

That in the month of July, 1913, the flume and flume line, above referred to, had been completed the entire distance to the plaintiff's millsite above described, and the waters diverted from Gold Creek as aforesaid were then, to wit, in the month of July, 1913, conveyed through said flume line so constructed, to and upon the plaintiff's said millsite, where the same were then and there applied to use in connection with plaintiff's mining and milling operations there carried on.

X.

That at all times herein mentioned the plaintiff was, and still is, the owner of a large group of mining claims and millsites, situate a short distance to the east of the city of Juneau, in the Territory of Alaska, which said group of mining claims and millsites comprise what is locally known and generally referred to as the Alaska-Juneau mine;

That a vein containing large deposits of low-grade gold-bearing ore occurs on the plaintiff's said group of mining claims, which said deposits have been mined on a small scale for more than twenty years.

That in the year 1899, a general plan was adopted by the plaintiff corporation with a view of opening

up, developing and operating its said mines on a large scale, and work was then and there actively commenced to carry this plan into effect. The plan so adopted provided for the opening up of the ore bodies in the mine itself, the [9] testing and sampling of the ores, the driving of a tunnel, so driven as to connect the mine workings with a point on the Colorado claim above described, the construction of a tram and railway through said tunnel, and the construction of a tram and flume line from thence to the shores of Gastineau Channel, the construction of a large milling plant at said last-mentioned point and the appropriation of the waters of Gold Creek to be diverted and applied in the manner above detailed.

That the work so commenced in the year 1899 has ever since been carried on with the highest degree of diligence and has resulted in the opening up of what are believed to be the largest deposits of gold-bearing ore ever discovered; in the completion of the contemplated tunnel driven a distance of 6,538 feet so as to connect the workings in the plaintiff's mine with the point on the Colorado lode claim above indicated, as well as the completion of four other tunnels, made necessary to furnish a route for the plaintiff's tram and flume line; the construction of a tram line extending from the plaintiff's mine workings through the tunnel to the portal thereof on the Colorado lode claim; and thence along the route indicated to the plaintiff's millsite; the construction of the flume and flume line and the diversion and appropriation of the waters as above

stated; the construction of wharves, warehouses, tramways, ore bins, rock-houses and numerous other buildings and appliances forming a part of a milling plant having a capacity of twelve thousand (12,000) tons per day, which is now in course of construction on the plaintiff's millsites, situate on the shore of Gastineau Channel, near the Jorgenson sawmill, as above [10] indicated;

That a portion of said milling plant, containing forty (40) stamps, is now practically completed and ready for use and the remaining portion of said milling plant is now being pressed to completion with all possible speed.

That in addition to the tunnels and tram line above referred to an additional and further tunnel is now being driven commencing at approximate sea level on the plaintiff's said millsite and extending in an easterly direction to connect with the workings of the plaintiff's mines near Silver Bow Basin in order to furnish an additional route for a tram line to use in connection with the transportation of ores from the plaintiff's said mines to the plaintiff's said milling plant; two tram lines being necessary to transport twelve thousand (12,000) tons of ore daily from the mines to the milling plant, which will, when completed, have a milling capacity of twelve thousand tons.

In addition to this the plaintiff has supplied itself with locomotives, cars and all other necessary appliances to operate its forty stamps already installed and to convey the necessary ores from the mine to its said mill, and will commence the opera-

tion of said mill as soon as an uprise, now being made from the face of its Gold Creek tunnel above described to the surface, has been completed and the necessary drifts have been completed to open up the stopes and permit the extraction of the ore therefrom.

XI.

That on or about the 17th day of December, 1913, the [11] defendants wrongfully diverted all the waters flowing in Gold Creek at a point approximately three-fourths of a mile above the plaintiff's dam and intake, without restoring the same to their natural channel, until the same were carried a great distance below the plaintiff's said dam and intake, and did thereby prevent the waters flowing in Gold Creek from reaching the plaintiff's said dam and intake, and have ever since continued to so wrongfully divert said water and prevent the same from reaching the plaintiff's said dam and intake, and are still continuing so to do.

That by reason of the said acts of the defendants, the plaintiff is wholly deprived of all the water flowing in Gold Creek, appropriated by it as aforesaid, and is prevented from using the same or any part thereof;

That the defendants threaten to, and will, continue to so wrongfully divert and convey said water beyond the plaintiff's intake and to so deprive the plaintiff of the same and of the use thereof, unless prevented by an injunction issued by this Honorable Court.

XII.

That at the time the water was so wrongfully diverted by the defendants, the plaintiff was applying the same, and the whole and every part thereof, to use in connection with the driving of its compressor plant, situate on the Colorado claim as aforesaid, and the plaintiff did then and there require the use of said water, and the whole thereof, in that connection, and has ever since required the same and still does so require it.

And further that the plaintiff now is and at all times hereafter will be in position to apply all the waters appropriated by it as aforesaid to use in connection with its mining and milling operations, herein elsewhere referred to, the same being the beneficial use designed at the time the appropriation was made, and will require at all times in the future the water appropriated by it as aforesaid and the whole thereof in order to carry on its said mining and milling operations. [12]

That the plaintiff has not sufficient power available from other sources to operate its said compressor plant, which furnishes compressed air for use in connection with the making of its upraise hereinabove referred to, and the driving of its drifts, tunnels and other openings necessary to open up its stopes; so that the plaintiff cannot carry on this work unless it is restored to the use of the water from which it is being wrongfully deprived by the defendants.

That since the diversion of the water by the defendants, as above stated, the plaintiff has been

carrying on this work to a limited extent, that is to say, it has carried on its work in connection with the making of its upraise, but has been unable to carry on any of the work, necessary in connection with the opening up of its stopes, due to the lack of power and compressed air;

That since the diversion of the water by the defendants, the air used in the making of its upraise is supplied in part by running one side of the compressor by means of an electric motor, there installed, having a capacity large enough to drive one side of the compressor only, and in part by conveying compressed air to its said mine workings from a compressor plant, situate on its millsite on the shore of Gastineau Channel.

And further that the air supplied from the two sources above stated is sufficient only to enable the plaintiff to carry on part of its operations, that is to say, it has enabled the plaintiff to carry on the making of its upraise, but has compelled it to abandon and cease work in connection with the opening up of its stopes until the additional supply [13] of compressed air can be obtained;

And in this connection the plaintiff further avers that it will be unable to supply any of the compressed air, generated at the Gastineau Channel compressor plant in connection with mine operations in its mines, as above stated, in the future without abandoning work not only in connection with the driving of its sea level tunnel, but also in connection with its work of mill construction, now being carried on, on its millsite; for the reason that

all the air coming from the said compressor plant, situate on the millsite, is necessary for use in connection with the driving of its said sea level tunnel and in connection with the driving of the machinery necessary to carry on its construction work, such as riveting hammers, power drills, cooking tools and other like appliances.

That it is necessary to continue work on said sea level tunnel in order that the same may be driven by the time that the milling plant, in course of construction, is completed, this, in order to furnish the mill with the necessary ore to keep it in operation.

And further that the plaintiff has made extensive preparations, involving the outlay of vast sums of money, aggregating approximately three million dollars, looking towards the construction and completion of its said milling plant; that this construction work cannot be carried on it if the plaintiff is deprived of the use of the compressed air, compressed at the compressor plant, situate on the millsite, which said compressed air is now being conveyed to its said Silver Bow Basin Mines, in order to [14] supply power at that point to be used in lieu of the power from which it has been deprived by the wrongful acts of the defendants above stated.

In this connection the plaintiff further avers that if it is restored to the use of the water from which it has been wrongfully deprived, as above stated, it will be enabled to complete its upraise and open up its stopes, so as to commence the operation of the forty-stamp mill now practically completed,

on about the 15th day of February, 1914, and further that as soon as said work of making said up-raise and opening up of said stopes is completed, the forty stamps now installed will be set in operation and the use of the water appropriated by the plaintiff as aforesaid will be necessary in order to supply compressed air and power for use in connection with the mining of the ores to be milled in said mill, so set in operation as well as for the purpose of furnishing power and battery water and for other use in connection with the operation of said mill and that if the plaintiff is deprived of said power it will be unable to supply its said mill with ore and unable either to set the same in operation or keep the same in operation when started;

That plaintiff has not sufficient power available from other sources and is unable to procure sufficient power from other sources to operate its drills and other appliances necessary for the mining of its said ores to be milled in its said mill, when set in operation; and that for the reasons stated the date on which said mill will be set in operation will be indefinitely postponed, unless the Court enjoins the defendants from continuing the wrongful diversion herein complained of. [15] In this connection the plaintiff further avers: That a portion of its said mill, to wit, one half of its capacity, will be employed by the plaintiff in the making of experiments in connection with the treatment of the ores mined, and that these experiments are necessary in order to furnish it with the necessary information

to work out the details of the milling plant, now under construction by it.

That unless the Court issue its temporary order enjoining the defendants from diverting the waters as aforesaid, and depriving the plaintiff of the use thereof, the plaintiff's operations, in connection with the completion of its upraise and opening of its stopes, will be delayed and hampered, the starting of its forty-stamp mill will be postponed and it will be prevented from making the experiments in connection with the treatment of the ores, which it contemplates making, and which will furnish it with information absolutely essential in determining upon and completing the details of its said large twelve thousand (12,000) ton milling plant, now in course of construction; that this would not only prevent the plaintiff from making the profits resulting from the mining and milling of the ores, but would delay in carrying on its construction work, by depriving it of such information as is absolutely essential, and which it would obtain from the operation of the forty-stamp mill, now practically completed.

That none of the injuries thus resulting to the plaintiff, can be compensated for in damages, that the same is such that money value cannot be calculated, and such that the resulting damages are wholly speculative, so that an action at law would give the plaintiff no relief whatever.

That one of the defendants The Alaska-Ebner Gold [16] Mines Company is insolvent;

That the trespass herein complained of is con-

tinuous in its nature and is such that the same will, unless enjoined, ripen into an adverse right and would give rise to a multiplicity of suits in which the damages sustained can not be calculated in money and in which it would be impossible to award the plaintiff compensation in damages.

That the plaintiff has no speedy or adequate remedy at law.

WHEREFORE the plaintiff prays for an injunction *pendente lite* enjoining the defendants, and each of them, from diverting the waters of Gold Creek, or any part thereof, and from in any wise interfering with the same so as to interfere with the use thereof by the plaintiff, and that the defendants, and each of them, be enjoined from doing or committing any of the acts herein complained of; and further that upon the trial of this cause the temporary injunction, so issued, be made permanent and the defendants, and each of them, be permanently enjoined from diverting any of the waters of Gold Creek appropriated by the plaintiff as aforesaid, and from in any wise interfering with the plaintiff's uninterrupted use of said waters; and for such other and further relief as to the Court may seem just and equitable, as well as for its costs and disbursements in this behalf incurred.

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff. [17]

United States of America,
Territory of Alaska,—ss.

Robt. A. Kinzie, being first duly sworn, on oath, says: That I am the general superintendent of the

plaintiff corporation in the above-entitled action; that I have read the foregoing Complaint and know the contents thereof and believe the same to be true.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 7th day of January, A. D. 1914.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My Commission expires Nov. 30, 1917.

Filed in the District Court, District of Alaska, First Division, Jan. 7, 1914. J. W. Bell, Clerk. By H. Malone, Deputy.

[Endorsements]: Original No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. The Alaska-Juneau Gold Mining Company, a Corporation, Plaintiff vs. The Ebner Gold Mining Company et al, Defendants. Complaint. Hellen-thal & Hellenthal Attorneys for Plaintiff. Office: Juneau, Alaska. [18]

Order Correcting Name of Party Defendant.

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation, THE ALASKA-EBNER GOLD

Mines Company, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA-
EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

This matter coming on for hearing, upon plaintiff's motion asking that the name, Alaska-Ebner Gold Mining Company, wherever the same occurs in the complaint herein, be corrected, by interlineation by the clerk, and be made to read, "The Alaska-Ebner Gold Mines Company," wherever the same occurs in caption and the body of the complaint herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the clerk change by interlineation the name Alaska-Ebner Gold Mining Company, wherever the same occurs in the complaint, including the caption of said complaint, to "The Alaska-Ebner Gold Mines Company."

Ordered this 10th day of January, A. D. 1914.

ROBERT W. JENNINGS,
Judge.

ENTERED Court Journal No. J, page 263.

Filed in the District Court, District of Alaska,
First Division. Jan. 10, 1914. J. W. Bell, Clerk.
By ———, Deputy.

[Endorsed]: Original No. ——. In the District Court for the Territory of Alaska, Division No. 1, The Alaska-Juneau Gold Mining Company, a Corporation, Plaintiff vs. The Ebner Gold Mining Company, a Corporation, et al., Defendants. Motion.

Hellenthal & Hellenthal, Attorneys for Plaintiff.
Office: Juneau, Alaska. [19]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1074-A.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation, THE ALASKA-EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA-
EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

Motion to Amend Complaint.

Comes now the plaintiff and respectfully represents that no answer has yet been filed herein and asks leave of Court to amend by interlineation the complaint herein in the following manner and to the following extent to wit:

The plaintiff asks to insert in paragraph twelve (12) at the bottom of page twelve (12) the following: "And further that the plaintiff now is and at all times hereafter will be in position to apply all the waters appropriated by it as aforesaid to use in connection with its mining and milling operations, herein elsewhere referred to, the same being the beneficial use designed at the time the appropriation

was made, and will require at all times in the future the water appropriated by it as aforesaid and the whole thereof in order to carry on its said mining and milling operations.”

And further to amend the complaint in paragraph twelve (12) of the complaint by inserting after the word [20] “operation” occurring on the sixteenth (16th) line of page fifteen (15), the following: “as well as for the purpose of furnishing power and battery water and for other use in connection with the operation of said mill.”

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 19, 1914. J. W. Bell, Clerk. By J. J. Clarke, Deputy.

[Endorsed]: Original No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. The Alaska-Juneau Gold Mining Company, a Corporation, Plaintiff vs. The Ebner Gold Mining Company, et al. Defendants. Motion. Hellenthal & Hellenthal, Attorneys for Plaintiff. Office: Juneau, Alaska, [21]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1074-A.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation, THE ALASKA-EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA-
EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

Order Allowing Amendment of Complaint.

This matter coming on to be heard on the applica-
tion of the plaintiff to amend, by interlineation,
and it appearing to the Court that no answer has yet
been filed herein and that the application of the
plaintiff in this behalf should be allowed,

IT IS ORDERED that the plaintiff is allowed to
amend its complaint by interlineation in the follow-
ing particulars, to wit:

That the plaintiff shall be allowed to interline on
page twelve (12) following the word "it" occurring
on the bottom of page twelve (12) by inserting at
that point the following: "And further that the
plaintiff now is and at all times hereafter will be in
position to apply all the waters appropriated by it
as aforesaid to use in connection with its mining

and milling operations, herein elsewhere referred to, the same being the beneficial use designed at the time the appropriation was made, and will require at all times in the future the water appropriated by it as aforesaid and the whole thereof [22] in order to carry on its said mining and milling operations.”

And further that the plaintiff is allowed to amend its complaint by interlining after the word “operation” occurring in the sixteenth (16th) line on page fifteen (15) the following: “as well as for the purpose of furnishing power and battery water and for other use in connection with the operation of said mill.”

Defendant is allowed ten days from this date within which to plead to said complaint as amended.

Done in open court this 20 day of Mch., 1914.

ROBERT W. JENNINGS,

Judge.

ENTERED Court Journal No. J, Page 407.

Filed in the District Court, District of Alaska, First Division, Mar. 20, 1914. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

[Endorsed]: Original No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. The Alaska-Juneau Gold Mining Company, a Corporation, Plaintiff vs. The Ebner Gold Mining Company, et al., Defendants. Order. Hellenthal & Hellenthal, Attorneys for Plaintiff. Office: Juneau, Alaska. [23]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1074-A.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation, THE ALASKA-EBNER GOLD
MINING COMPANY, a Corporation, AN-
GUS MACKEY, as Receiver for the
ALASKA-EBNER GOLD MINING COM-
PANY and DOWNIE D. MUIR,

Defendants.

Answer.

Come now the above-named defendants, and an-
swering the complaint and amendments thereto, ad-
mit, deny and allege as follows:

I.

Referring to paragraph I of said complaint, these
defendants have not knowledge or information suf-
ficient to form a belief as to the matters, facts and
allegations therein contained, and therefore deny the
same and each and every part of said paragraph.

II.

Referring to paragraph IV of said complaint, these
defendants admit that the said Angus Mackay was,
on or about the 29th day of June, 1912, appointed
receiver, as in said paragraph alleged, of the Alaska-
Ebner Gold Mines Company, and further state in

respect thereto and allege that he took possession and control under said appointment of all of the land and personal property of the defendant, the Ebner Gold Mining [24] Company, the said former corporation having at said time a mortgage either upon the physical property of the Ebner Gold Mining Company, or the capital stock of said company, and said defendant Mackay is still such receiver, and in possession of the property of the Ebner Gold Mining Company as above alleged.

III.

Referring to paragraph VI, of said complaint, these defendants deny the same and each and every portion thereof.

IV.

Referring to said paragraph VII of said complaint, these defendants deny the same and each and every allegation therein contained.

V.

Referring to paragraph VIII of said complaint, these defendants have not knowledge or information sufficient to form a belief as to the matters, facts and allegations contained in said paragraph and therefore deny the same and each and every allegation therein contained.

VI.

Referring to paragraph IX, of the complaint, these defendants deny the same and each and every allegation therein contained.

VII.

Referring to paragraph X of said complaint, these defendants deny the same and each and every allega-

tion therein contained, except that the plaintiff is the owner of some mining claims.

VIII.

Referring to paragraphs XI and XII of said complaint, these defendants deny the same and each and every allegation therein contained.

And by way of cross-complaint and affirmative defense, [25] and a further answer to the matters, allegations and things pleaded in the complaint of plaintiff herein, these defendants allege:

I.

That the defendant, the Ebner Gold Mining Company is now, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the Territory of Alaska, and has complied with the laws therein respecting its doing business in said territory, and has paid the license fees for the years 1913 and 1914, as is provided for by chapter II of the Session Laws of 1913, of the Territory of Alaska, and is authorized to sue and maintain suits, actions, and proceedings in said Territory of Alaska.

II.

That said Ebner Gold Mining Company, one of the corporations defendant herein, is now and has for a long time past, and prior to the commencing of this action, been the owner, by location, patenting and mesne conveyancing, of a large number of mining claims and mill sites in Silver Bow Basin, near Juneau, Alaska, a number of which said mining claims lie along side of and abut upon some of the mining claims which the plaintiff company sets

out and refers to in its complaint herein as owned by it; that said mining claims of said defendant company carry and contain gold in great value in the form of a low grade milling ore; that through these mining claims, amounting in number about thirty, there flows a creek or stream of water known as Gold Creek, being the same creek described and referred to in plaintiff's complaint herein; that said creek is a mountain stream with considerable fall and rapids, and at certain seasons of the year carries quite a large volume of water. At other seasons, on account of cold weather, [26] the water is diminished therein to somewhat of a small flow, not containing water at said times sufficient for the use of the said Ebner Gold Mining Company in the opening up, developing mining and milling ore which said company extracts from its said mines, as is more particularly hereinafter set forth; that for more than 20 years last past, the said Ebner Gold Mining Co. (hereafter to be referred to as the defendant company has been mining and milling the ore from some of its mining claims at the upper end of its group, and, for said purpose, first constructed a 10-stamp quartz mill, and which was thereafter increased to a 15-stamp quartz mill, and in connection therewith had its ore bunkers, air compressor, and all buildings, equipment and machinery necessary for the successful running of said stamp-mill, and treating the ores taken from some of its mining claims, and also in connection with said operations, said defendant company posted water location notices on Gold Creek, and

appropriated and diverted therefrom, on its own property, water which was used in connection with its mining operations for the purpose of generating power for its machinery and treating its ores, and, for the purpose of the application of said water, said defendant company constructed its flume and pipe lines to convey the same to the place of use in, over and upon its own property, and the main flume used for this purpose was of the dimensions of 18 inches by 36 inches; that said company, thus equipped, carried on its mining operations successfully over the period of time mentioned in this paragraph, and also developed and opened up said property, and its ore bodies, by running of tunnels, cross cuts, open cuts and such other work as is generally resorted to in the proving of the value of the ore bearing bodies within the limits of said defendant [27] company's mining property.

IV.

The larger the scale upon which ore bearing bodies, of the kind and nature that are within the limits and boundaries of the mining property of said defendant company, are worked the greater profit there is realized from such working and operating the same, and mining, milling and treating the ores taken therefrom; that a long time prior to the year of 1908, the said defendant company and its general manager and president, William M. Ebner, decided upon opening up, working and operating said mines on a larger scale than the said work had been conducted prior to that time, and to that end and purpose it was concluded to drive

a large working tunnel, commencing at the lower end of the said group of mining claims, or on what is known as the Cape Horn No. 2 lode claim and thence extending through said group of claims the entire length to the upper and old workings of the said defendant company, herein referred to, and the building, constructing and equipping a large stamp-mill at or near the mouth or portal of said tunnel and the building and construction of flumes or ditches, and the laying of pipe lines for the purpose of conveying water from Gold Creek from or near the point thereon where the said defendant company had theretofore been diverting its water for its use as herein stated, to its said new mill, which said flume, ditch and pipe line, throughout their entire length, would be upon the property of said company; and to erect such other buildings and install such other machinery necessary to carry out the plans so decided upon as aforesaid. That during the year of 1909 one H. T. Tripp, an experienced mining engineer, was employed to look over, examine [28] and explore said mining property, and to report on the advisability of the plan and scheme of opening up, mining and operating said property, as had been decided upon, as aforesaid, and the said Tripp reported favorably upon said plan, plans or scheme, as aforesaid, and which had been previously decided upon by the said defendant company and the said Ebner; that said Tripp completed his services as aforesaid some time the latter part of June or the first of July, in the year 1910. _

V.

That as early as the year 1880, the miners in the near vicinity of Juneau, Alaska, and in the surrounding country and particularly in Silver Bow Basin, where the mining property and mining claims, described in the complaint herein, and those of the defendant company, and Gold Creek are situated, discovered gold. That ever since said time both quartz and placer mines have been worked and mined more or less in Silver Bow Basin and in Southeastern Alaska, and the country surrounding the town of Juneau, and for the mining of said properties and in connection therewith, water has been appropriated and diverted from streams for said mining and other beneficial uses, and that ever since said date it has been the universal and general rule, practice and custom for any person or corporation desiring to appropriate water for said last above mentioned purposes to post a notice in writing in a conspicuous place at the point of intended diversion, stating the amount of water claimed to be diverted from said creek to be used for beneficial purposes. Said posting of notice, as aforesaid, has always been considered under the said general practice, rule and custom of miners, as the first step and the declaring of the intention of such person or corporation to apply said water to beneficial use. [29] The next step that has been followed under said custom, rule and practice has been the diversion of the water from its natural channel by means of a ditch, canal or other structure, and then the prosecution of the work so as to actually apply the

water to the beneficial use and its application thereto. That while the said H. T. Tripp was engaged in exploring the mining claims belonging to the defendant company for the purpose and in the manner in the last paragraph above stated, and about the time that he had decided upon following out the plans which had been formulated by the defendant company and William M. Ebner for the larger opening up and mining of said property, on the 20th day of June, 1910, acting in behalf of the said defendant company and its successors in interest, did locate, claim and appropriate 10,000 miner's inches of water flowing in Gold Creek at the point of diversion hereinafter referred to, said water so located, claimed and appropriated to be conveyed by ditch, flume or pipe along the banks of Gold Creek to any point on the property of the defendant company and to be used in connection with the mining and milling of the ores from the property and mines of said defendant company; and the said Tripp did, then and there, acting for and on behalf of the said defendant company, or its successors in interest, post a notice in a plain and conspicuous place on the dam in Gold Creek which had theretofore been used by the said defendant company in diverting water from Gold Creek, and turning it in to its 18 or 36-inch flume, and conveying it through the same for the purposes hereinbefore mentioned, in connection with its running its 15-stamp mill, which said dam is located on the patented property of said defendant company and near its 15-stamp mill, which

said [30] notice of appropriation and location of water is in words and figures as follows, to wit:

NOTICE OF WATER.

Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miner's inches of the water flowing in this creek or any part of 10 thousand miner's inches that may be flowing at any season of the year to be conveyed by ditch flume or pipe along the bank of Gold Creek with pipe or *floom* or both to any place on the property known as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner Dam about $1\frac{3}{4}$ miles up from Juneau, Alaska, on Gold Creek.

Dated this 20th day of June, 1910.

Time 7:30 A. M.

Locator—H. T. TRIPP.

Witness:

JOHN SOINI.

—which said above notice was on the 25 day of Oct., 1910, duly and regularly recorded in the office of the recorder of the Juneau Recording District, which said Recording District embraced the territory through which Gold Creek flows and the place where said notice was posted; that while said H. T. Tripp signed or affixed his own name to said notice, he was in truth and in fact acting as agent and representative of the said defendant company, or its successors in interest, and whatever right has been acquired by reason of the act of said Tripp has been by mesne conveyances, made, executed and delivered, con-

vayed to this defendant company.

VI.

That on the 17th day of August, 1910, John R. Winn, acting as agent and attorney for the Ebner Gold Mining Company, located, claimed and appropriated all of the water of Gold Creek at a point of diversion hereinafter referred to; that is, all of the water of said creek, if any, in excess of what said corporation was not then entitled to by reason of prior location, use or appropriation or riparian ownership, and which said [31] water was to be used in the working, mining and developing of the said mines of the said defendant company, and milling and treating and reducing ores therefrom, etc.; which said notice was posted in a conspicuous place on the same dam that the Tripp notice was posted, which said dam is on the Crown Point patented lode claim of the said defendant company, and said notice is in words and figures as follows, to wit:

NOTICE OF WATER LOCATION.

NOTICE IS HEREBY GIVEN that the EBNER GOLD MINING COMPANY, a corporation, are the owners and claim under this Notice all the waters of this creek, Gold Creek, to its entire flow during all seasons and at all time or times, that said corporation is not already entitled to by reason of prior right or prior location or appropriation, or prior right to use or appropriate; that is all the water of said creek, if any, in excess of what said corporation is not now entitled to by reason of prior location, use or appropriation or riparian ownership, to

be conveyed by ditch, flume or pipe or in any other practical or convenient way from said creek and creek bed and to be used in the working, mining, and developing of the mines owned by said Ebner Gold Mining Company, and in milling, treating and reducing the ores taken from said mines of said corporation and for other beneficial and useful purposes.

Said Ebner Gold Mining Company does not intend by this notice to waive any right that it may have to the use of the waters of said creek by reason of it flowing over the mines and mining claims now owned or possessed by it, and does not waive any right of riparian ownership of said water or riparian use of said water flowing over the mines and property owned or possessed by it; nor does not waive any right to the use or any or all of said waters by reason of its or its predecessors in interest prior location, appropriation or use of said water.

This notice is posted on the Ebner Dam on the Crown Point Lode Claim, (patented) U. S. Survey No. 90, and owned by the Ebner Gold Mining Company, the locator herein.

Date of this Notice of Location August 17, 1910.

Posted on the 17th day of August, 1910.

EBNER GOLD MINING CO.

By JNO. R. WINN,

Its Agent and Attorney.

Witnesses:

N. L. BURTON.

WILLIAM WALKER.

That said notice was on the 17 day of August, 1910, duly and regularly recorded in the office of the recorder for the Juneau Recording District at Juneau. Said Gold Creek and the place [32] where said notice was posted is embraced in said recording district.

VII.

That within a reasonable time after the posting of the said Tripp notice, as aforesaid, and in the months of July and August, 1910, work was actively commenced looking toward opening up and mining said property in the manner herein stated and as had previously been decided upon by the said defendant company, Ebner and Tripp, Timbers, lumber and material were purchased and a 200-stamp mill framed, and most of the machinery bought to equip the same, which said mill was to be erected on the Cape Horn No. 2 lode claim of the said defendant company at or near the portal of the new working tunnel of the defendant company, hereinbefore and hereinafter to be referred to, which is at a point on Gold Creek at the lower end of the large group of claims belonging to said defendant company, and grading on the mill site was commenced. That on or about the last of July or the first of August, 1910, a crew of surveyors was sent upon said property to lay out and survey with accuracy the new tunnel herein referred to, and the new flume line to convey the water from Gold Creek from the point of the old dam where the said Tripp and Winn location notices were posted along the left bank (going up Gold Creek) across the property of the defendant

company to the point on the lower end of the property near where the mill is to be constructed and the portal of said tunnel; that a crew of men was put to work in clearing up the right of way for the construction of the new flume line; that work was continuously and with diligence kept up on said flume line and on the 14th day of September, 1910, the water was diverted from Gold Creek at the defendant company's dam herein referred to through a large open cut made for the purpose of laying [33] the flume and a few days thereafter the flume at that point was constructed and placed in said open cut, which said flume is $3\frac{1}{2}$ by 4 feet, and the water was kept continuously running through said flume until the same was completed the full length of 4,000 feet to the penstock of said company, which penstock is a short distance from where the foundation was cleared off and partly graded for the new mill to be constructed on the Cape Horn mill site, and said point was reached with said flume and said flume completed on the 15 day of Dec. 1910, as it had been decided upon by the said defendant company, Ebner and Tripp, and as had been laid out and surveyed.

That work was commenced on the new tunnel after it had been laid out and surveyed and decided upon on the — day of —, 1910, and has ever since said time been kept up actively and with diligence, and said tunnel is 8 by 8 feet and had been driven at the time of the commencement of this action 2,600 feet, and in said new workings there is now over 4,000 feet including cross-cuts, drifts and

raises, and four faces are now being advanced.

Before the commencement of this action a large new air compressor plant was erected near the mouth of the new tunnel above referred to and a pipe line laid connecting said air compressor with the penstock at the lower end of the new flume, and in August, 1913, said pipe line was all connected up, the air compressor installed, and water put through the new flume and pipe line and applied to generating power for running said new air compressor and driving said new tunnel, and said water has been so applied to said air compressor ever since said date.

That prior to the commencement of this action, the [34] lumber and materials herein referred to, for the construction of said 200-stamp mill, as well as all of the machinery purchased for the equipment of said mill had been forwarded to Juneau, Alaska, and most of the same hauled from the wharves and the streets of said town to the said Cape Horn mill site, a distance of over one miles from Juneau, and the said defendant company is now engaged in the erection of a mill with said lumber and material upon its Cape Horn mill site, and installing the machinery therein; that the waters of said Gold Creek have been taken therefrom through the new flume in quantities from time to time as it became necessary to apply it to use by this defendant, and as its work, herein referred to, progressed. There has been installed by the defendant company, since the commencement of this action, and there is now being installed, further machinery which is

from time to time requiring additional water, as follows, to wit:

One 15" water-wheel for crusher and pulverizer.

One water-wheel for the generating fan in the tunnel.

Three time as much compressed air is now being used as was at the time of the commencement of this action.

The electric generating unit increased from $3\frac{3}{4}$ kilowatts to 18 kilowatts.

That all of the water that has been used or is being used by the defendant company, as aforesaid, is necessary for the conducting of its mining enterprises, and has been taken from the mining claims of the defendant company, conducted and conveyed across its mining claims and mill sites, to its point of use and application on its mining claims and mill sites, and then returned to Gold Creek after being used on the mining claims and mill sites of the defendant company.

VIII.

That at the time that the plaintiff claims that these defendants were wrongfully diverting water from Gold [35] Creek and depriving plaintiff of the use thereof, this defendant was using said water and all of the same that plaintiff was so claiming these defendants were depriving said plaintiff of, and applying the same and the whole thereof in connection with the driving of its new air compressor and purposes herein referred to, and it was necessary for the said defendant company to have said water for said purpose, and it has been necessary

ever since said time for this defendant to have the same, and at all times hereafter this defendant company will require said water and all of the same to be used in connection with its mining and milling operations herein and in this answer referred to, the same being the beneficial use for which said water was located, appropriated and taken up, and the said defendant company will at all times hereafter require such additional water from Gold Creek as will be necessary for carrying on its mining and milling operations as herein stated, and will need all the water of said creek claimed under its locations herein set out, when its plant, referred to herein, is completed, and its mill in full operation. That all of the work done by the defendant company herein referred to, for the purposes herein mentioned of and the application of said water to use has been conducted with diligence and is still being carried on diligently, and will be prosecuted with diligence, there being at this time about 100 men employed in carrying on the work mentioned in this answer and other work opening up and developing said property and making preparations for the mining, milling and treating the ores to soon be taken from said mines; that the mill that is now being erected thereon is of small capacity and intended principally for sampling purposes during the time of opening up the large bodies that are known to exist on said property, and preparatory to building a mill [36] of sufficient capacity in the near future to mine and mill the ores, taken from said property, on a paying basis. When said

larger mill is built, which will be in the near future, it will require a great deal more power, and consequently more water, and the water up to and in excess of the capacity of the present new flume, and Gold Creek is the only present available water power for this defendant company, and, as the ore is to be milled and mined is of a low grade, it has to be treated economically, and for this reason the water power of Gold Creek is of almost incalculable value to this defendant company. That up to the present time there has been expended on said properties of the defendant herein mentioned and on account of the matters herein alleged over the sum of \$——.

IX.

By reason of the facts contained and set forth in this answer, the defendant, the Ebner Gold Mining Company has the paramount and prior right to all of the water of Gold Creek in this answer claimed, and all of the flow of said creek, by reason of its prior posting and recording of notices and declaration of water rights, as herein set forth, and by reason of its prior notice and intention to divert the water from Gold Creek and apply it to beneficial use, and by reason of the said defendant company's prior diversion of the water from the natural channel of said Gold Creek by means of its ditches and flume lines, all of which were prior to any diversion or appropriation of plaintiff herein, and, further by reason of its diligent prosecution of its work and the actual application of the water of said creek to

beneficial use, and by reason of it being a riparian owner.

X.

And further answering the said complaint, these [37] defendants allege that if plaintiff ever posted or caused to be posted and recorded any such paper writing as it claims in its answer L. D. Mulligan posted and recorded, said paper writing was posted on the Lotta patented mining claim, and said Lotta mining claim was then and had been for a long time prior thereto and is now *owed* and possessed by the defendant company and said company has been at all times in the open, notorious and exclusive possession thereof, and if such posting was made thereon it was done without the knowledge or consent of this defendant and against its will, and the same was done by plaintiff with the intention of diverting the water from Gold Creek at a point on said claim and conveying it across said claim, and said plaintiff did attempt to convey the water from said point on said claim and across the same, all of which said acts of said plaintiff company were wrong and without the will or consent or knowledge of the defendant company, and constitute a naked, open, malicious and notorious trespass on the property of this defendant company, and any work that was done under said notice or any work or preparations made by the plaintiff looking toward diverting the water from said point and over said claim was of no force or effect as a matter of fact or of law, and can avail the said plaintiff nothing and no rights of plaintiff can be acquired thereby.

And in this connection, and further answer the complaint of plaintiff, these defendants state that the said defendant company at all times mentioned, and for a long time prior to any attempt of the plaintiff company to divert any of the water from Gold Creek, was and now is the owner of what is known as the Parish No. 2 and the Mackay lode mining claims the latter located on June 12, 1911, adjoining the Lotta patented lode mining claim [38] both of which said claims constitute one of the groups of contiguous mining claims which constitute the group of claims of said defendant company referred to herein, and all of the first dam that plaintiff constructed or partly constructed in Gold Creek was on the Lotta patented claim, and said plaintiff attempted to make a diversion of the water at that point but did not succeed, and part of the plaintiff's present dam referred to in its complaint is constructed or was constructed upon the Lotta patented lode claim and part of the same on the said Parish No. 2 lode claim, and there are five or six hundred feet of plaintiff's flume referred to in its complaint constructed upon in and over said Parish No. 2 lode claim, and the entry was made on said property and mining claims while said defendant company was in the open and notorious and sole possession thereof, and was a wrongful entry and was made by force and violence on the part of plaintiff, and was a malicious and naked trespass, and if plaintiff made any diversion of water from Gold Creek by means of any such dams or either of them,

and to any ditch or flume, it was done under the circumstances above mentioned and constitute a naked trespass, and said plaintiff cannot gain any rights thereby, or avail himself of any such action or acts, or diversion thus made.

XI.

Defendants further allege that should the plaintiff be granted the relief demanded herein, it would take the full flow of water of Gold Creek during part of the year from said creek, conduct it to the shores of Gastineau Channel, a distance of about two miles from its intake, and would thus deprive about two miles of lower creek owners of property and water rights [39] entirely, which is unjust, inequitable and against the law.

XII.

That Gold Creek, as alleged herein, at certain seasons of the year carries a large volume of water sufficient to fill both plaintiff's flume and defendant's new flume to their full capacity, the said creek being fed by rain and the melting of snow and glaciers. In cold weather, the said creek contains a very small volume of water, and at the time plaintiff commenced its said action herein, and for some time prior and after said time there was not sufficient amount of water in Gold Creek at the defendant company's intake to be of any beneficial use to the plaintiff company for the purpose claimed by said plaintiff, but was of beneficial use to the defendant company on account of the great head there is to the water between defendant's penstock, referred to herein, and its new air compressor, to

which air compressor the water was being applied.

WHEREFORE DEFENDANT'S PRAY,

First. That the complaint of plaintiff be dismissed, and that it go hence without any relief herein whatsoever.

Second. That the defendant, the Ebner Gold Mining Company, a corporation, be adjudged and decreed to be the owner and entitled at all times and all seasons of the year to the entire flow of water of Gold Creek at its dam, and the use of said water for the purpose in this answer stated, and that it be entitled to divert and take from the regular channel of Gold Creek all of said water and convey it by ditches or flumes or pipes, or to convey it in any manner to any place, and to apply it to any beneficial use that said defendant company may elect and to continue the use of the said water of Gold Creek and continue the use of all the water of said Gold Creek that it has heretofore used and divert it and apply it to use [40] in any manner it may elect for any and all beneficial purposes, and that all of the defendants herein be entitled to their costs and disbursements expended and for such other and further relief as to the Court may seem just and equitable in the premises.

WINN & BURTON,

Attorneys for Defendants.

United States of America,
Territory of Alaska,—ss.

Angus Mackey, being first duly sworn, on oath says, that I am one of the defendants in the fore-

going and above-entitled action and have heard read the *the* foregoing answer and know the contents of the same and believe them to be true.

ANGUS MACKAY,

Subscribed and sworn to before me this 9th day of May, A. D. 1914.

[Notarial Seal]

JNO. R. WINN,

Notary Public in and for Territory of Alaska.

My commission expires June 4, 1914.

Filed in the District Court, District of Alaska, First Division. May 9, 1914. J. W. Bell, Clerk.
By J. J. Clarke, Deputy.

[Endorsed]: No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. The Alaska-Juneau Gold Mining Company, a corporation, Plaintiff vs. the Ebner Gold Mining Company, a corporation, the Alaska-Ebner Gold Mining Company, a Corporation, Angus Mackey, as Receiver for the Alaska-Ebner Gold Mining Co. and Downie D. Muir, Defendants. Answer. Winn & Burton, Attorneys for Defendants. Juneau, Alaska. [41]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1074-A.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation, THE ALASKA-EBNER

GOLD MINES COMPANY, a Corporation,
ANGUS MACKEY, as Receiver for THE
ALASKA-EBNER GOLD MINES COM-
PANY, and DOWNIE D. MUIR,

Defendants.

Reply.

Comes now the plaintiff and for Reply to the Answer of the defendants herein admits, denies and alleges as follows:

I.

The plaintiff denies each and every allegation in said Answer contained, except in so far as such allegations are either admissions of the allegations contained within the complaint or are hereinafter admitted.

II.

The plaintiff admits that the Ebner Gold Mining Company is the owner of certain mining claims and mill sites, the location of the same and the extent thereof is hereinafter more especially referred to, and the plaintiff also admits that Gold Creek flows across the same, and also that Gold Creek is a mountain stream having considerable fall and containing a number of rapids and that at certain seasons [42] of the year it carries large volumes of water and also that at other seasons the flow is diminished so that there is comparatively little water left in the creek.

III.

Referring to the allegations of paragraph five of the defendant's Answer, the plaintiff admits: That gold was discovered in the localities mentioned in

the year 1880, and also that mining has been carried on in Silver Bow Basin and the surrounding territory ever since the time that gold was so discovered and that during all of said time water has been diverted from the streams and appropriated for use in connection with the conduct of such mining operations. And also that in connection with the appropriation of water for the purpose mentioned, it has been and is the universal and general rule, practice and custom for those desiring to appropriate water to post a notice in writing in a conspicuous place at the point of intended diversion stating, among other things, the amount of water claimed. This, however, under the rule and custom of miners in this district, as it will hereinafter more particularly appear, is but one of the things that such water notice must state, and in this connection the plaintiff further avers:

That gold was first discovered in Alaska about the year 1880.

That some of the mining claims now owned and operated by the plaintiff company were the first quartz locations made in the Territory. That the newly discovered district was named "The Harris Mining District," after its discoverer, Richard [43] Harris. That the topographic and climatic conditions obtaining in Southeastern Alaska, the territory in which the new discovery had been made, were found to be such that the soil was not adapted for agricultural purposes, except that here and there small patches might be found where garden truck and vegetables of such a character that the same did not

require ripening, might be produced. So that the territory in which the newly discovered district lay was suitable only as a place in which to carry on the pursuit of mining. Under these circumstances, the doctrine of riparian rights was found to be wholly inapplicable to the Territory of Alaska and to the conditions obtaining there.

That Gold Creek as well as all and singular the property rights and other things connected therewith to which reference is made in this reply, are situate within the boundaries of the Harris Mining District. That at a meeting of the miners of the Harris Mining District, previously organized and still recognized and existing, held in the year 1882, the miners of said district duly and regularly adopted the following rules with reference to the diversion and appropriation of water:

“Article I. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Article II. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor [44] in interest ceases to use it for such a purpose, the right ceases.

Article III. The person entitled to the use may change the place of diversion, if others are not injured by such change and may extend the ditch, flume, pipe or aqueducts by which the diversion is made to place beyond that where the first use was made.

Article IV. A water appropriation may be turned into the channel of another stream and

mingled with its waters and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

Article V. As between appropriators, the one first in time is the one first in right.

Article VI. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

First. He claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure.

Second. The purpose for which he claims it, and the place of intended use.

A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the District.

Article VII. Within twenty days, during the working season; after the notice is posted, the claimant must commence the excavations or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted [45] by rain or snow.

Article VIII. By 'completion' it is meant conducting the waters to the place of intended use.

Article IX. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted.

Article X. A failure to comply with such rules deprives the claimant of the right to the use of the

water as against a subsequent claimant who complies therewith.

Article XI. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases."

That all and singular the above and foregoing rules and regulations have been and remain in force and have been universally observed by the miners of the Harris Mining District at all times since their adoption and are still being so observed, and are in all respects in full force and effect. That all the things required by the above rules, in connection with the appropriation of water, are also required by the customs of the miners of the Harris Mining District, and under said customs a forfeiture results whenever any of such requirements are not complied with.

IV.

Referring further to the allegations contained in paragraph five of the defendant's Answer, in relation to the notice therein referred to as having been posted by one H. T. Tripp, the plaintiff avers:

That it has no knowledge as to whether said Tripp posted said notice, or did not so post it, and therefore denies that [46] the same was posted at the time indicated in the Answer or at all, but in this connection plaintiff further avers: That if said notice was posted at the point mentioned in the manner

indicated in said Answer, that said notice did not comply with the requirements of the miners' rules hereinbefore referred to, in that the place of intended use is not designated in said notice. Further, that the said H. T. Tripp did not comply with the said miners' rules above referred to, in that the notice, which was claimed to have been posted on the twentieth day of June, 1910, was not recorded until the twenty-fifth (25th) day of August, 1910, whereas the said rules require the recording of such water notice within ten (10) days after the same had been posted. And further, that said miners' rules were not complied with in this, that within twenty (20) days during the working season, after the notice was posted, the claimant did not commence the excavation or construction of the works in which he intended to divert the water, as required by said rules and in this connection, it is averred that the months of June, July and August are and constitute a part of the working season. That because of each of the failures to comply with the miners' rules, as above stated, the right of the claimant did not and could not under the rules relate back to the time the notice was posted. That because of the failures, and each of such failures, to comply with such rules, the claimant was and is deprived, under the rules, above referred to, of the right to the use of the water sought to be appropriated and any and all rights, that the original claimant or his successors may have had, have been forfeited as against the plaintiff, who has in all respects complied with the above and foregoing rules in making [47] its ap-

appropriation of water as detailed in the complaint herein.

V.

Referring to paragraph six (6) of the defendant's Answer, the plaintiff admits that on or about the 17th day of August, 1910, John R. Winn, acting as agent and attorney for the Ebner Gold Mining Company, posted the notice set up in paragraph six. In relation to the last-mentioned notice, however, the plaintiff avers that said notice does not comply with the provisions of Article Six of the miners' rules hereinbefore above set forth in that the place of intended use is not designated in said notice and further in that the quantity of water claimed is not designated in miners' inches, as by said rule required, or at all. In this connection the plaintiff avers that because of such noncompliance with the above rules the claimant's right to the use of the water does not and cannot relate back to the posting of the notice or at all, as provided by Article Nine of said rules, and further that the claimant's right, if any it had, was forfeited and he or it was deprived of the same because of the failure to comply with the rules above referred to, as against the plaintiff who in all respects complied with said rules in relation to the appropriation of the water claimed by it as set forth in the complaint. This is in accordance with the provisions of Article Ten (10) of the rules above set forth. In this connection the plaintiff further avers:

That the Ebner Gold Mining Company never did commence work looking towards the making of the

excavation or the construction [48] of the works to divert the water attempted to be claimed by it under said notice; that its right to the use of said water, if any it ever had, was forfeited because of its failure not to commence work looking toward the making of the excavation or the construction of the works, with which the water was intended to be diverted within twenty days after the posting of said notice. And in this connection it is further averred that the months of August and September are within the working season as applied to the Territory through which Gold Creek flows. And it is averred that by reason of such failure to commence work as above stated within the time limited by the said rules, the Ebner Gold Mining Company forfeited whatever right it ever had, if it ever had any, to the use of the water attempted to be appropriated and was, by virtue of Article Ten of the rules above set forth deprived of such right as against the plaintiff, an appropriator who in all respects complied with said rules.

Referring to paragraph ten of the defendant's answer, the plaintiff avers that the point on which L. D. Mulligan posted the notice of water appropriation, referred to in the complaint, is situate in wild and unoccupied territory a considerable distance down the creek to the south of the buildings owned and in the possession of the Ebner Gold Mining Company; that in posting the notice at that point it was the intention of the plaintiff to post the same immediately below the lower or most southerly side line of the Lotta claim and not upon said Lotta

claim; that if said Lotta claim were located upon the ground in accordance with the field-notes contained in the [49] patent thereof, starting from known and well-established points in the vicinity or by tying said claims to Gold Creek in the manner indicated in the patent of said claim, said ties being the only ties or calls to natural objects given in said patent, the point where the notice was posted by the said Mulligan would be below and to the south of the lower side line of the Lotta claim and not on said claim; that if said claim were located with reference to certain stakes found in the ground, the location of which was unknown to the plaintiff at the time the said L. D. Mulligan posted its said location notice, the said notice would be a few feet above and to the north of the lower side line of said Lotta claim, and on the Lotta claim.

Stricken.—J. W. B.

Referring especially to the allegations of paragraph ten (10) in the defendant's answer, the plaintiff denies that either it or the said L. D. Mulligan went upon the Lotta mining claim as a malicious or wilful or naked trespasser, or at all except as herein-after stated. And in this connection and in order to establish its good faith in the premises, the plaintiff avers:

Stricken.—J. T. Reed, Dep. Clerk. J. W. Bell.

That the point at which the said L. D. Mulligan posted the notice of water appropriation, as alleged in the complaint, is situate in wild and unoccupied territory; that the lower or southerly side line of the Lotta lode mining claim was not at the time the no-

tice was so posted established or declared by a judicial decision or otherwise; that if said Lotta claim were surveyed and located upon the ground in accordance with the field-notes contained in the patent thereof, starting from known and well-established points in the vicinity, or by tying said claim to Gold Creek in the manner indicated in the patent of said claim, said tie being the only tie or call to natural objects given in the patent, the point where the notice was posted by the said Mulligan would be below and to the south of the lower side line of the Lotta claim and not on said claim.

Stricken.—J. T. Reed, Dep. Clk.

In this connection the plaintiff further avers: That it was claimed that there were at that time upon the ground certain stakes intended to mark at least some of the corners of the Lotta mining claim upon the ground, but that the plaintiff was entirely without any knowledge concerning either the claim so made or the existence of such stakes, and that the only available means by which the plaintiff could determine the location of the Lotta claim upon the ground consist [50] in the field-notes given in the patent and such known, established and familiar objects as the corners of plaintiff's claims and other like points; that the plaintiff consulted all the available data and used all the means at hand with a view of determining the southerly side line of the Lotta, and in so doing reached the conclusion in good faith that the same was situate upon the ground to the north of and above the point where the said notice of the said Mulligan was posted, so that the said last-men-

tioned point would not fall or be upon the Lotta claim; that the plaintiff thereupon with *bona fide* and honest intention of posting said notice to the south of and below the boundary of the said Lotta claim caused the same to be posted at the point where the same was posted by L. D. Mulligan. That shortly thereafter its attention was directed to the fact that the Ebner Gold Mining Company, one of the defendants herein, claimed the southerly side line of the Lotta to be further to the south, so that the said Mulligan notice as posted would fall upon the Lotta claim; that immediately upon being so advised the plaintiff formed the intention of diverting the water at the point below the line so claimed by the Ebner Gold Mining Company as the southerly line of the Lotta claim, and afterwards built its dam and intake at a point below the line so claimed as the southerly side line of the Lotta claim by the said Ebner Gold Mining Company; that the southerly line of the Lotta lode mining claim was, after the notice was posted and after the plaintiff had built its dam and intake at the point where the same is now situate, declared and adjudicated to be marked by the stakes upon the ground above referred to, so that the point where the said Mulligan notice was posted was determined to be upon the [51] Lotta claim. The dam and intake of the plaintiff constructed upon the ground, however, was to the south of and below the southerly boundary of the Lotta claim as so established and not upon the said Lotta claim.

Stricken.—J. T. Reed, Dep. Clerk.

Referring especially to the allegations of paragraph ten (10) in defendant's answer the plaintiff denies that it went on the Lotta mining claim as a malicious or willful or naked trespasser, but admit that it did go upon said claim to post a notice and did post the said Mulligan notice and not otherwise by mistake in good faith not knowing where the boundaries where after making an honest effort to determine the location of the same. [52]

J. W. Bell, J. T. Reed, Dep. Clk.

In this connection the plaintiff avers that it acted in the best of faith in determining the lower side line of said Lotta claim, consulted the notes of said claim as contained in the patent, as well as other data available and at hand and determined upon the point where said notice was posted by Mulligan after a consideration of all the facts before it, believing that said point was to the south of and below the lower side line of said Lotta and not on said Lotta claim.

Stricken.—J. W. B.

In this connection the plaintiff avers that the work done by it looking towards the appropriation of the water during the month of August and early part of September, was of such a character that it was necessary to perform the same at the points and in the manner that it was done regardless of [53] the exact point where the water was to be diverted from Gold Creek, that is to say, said work was as necessary and applicable in connection with the diversion made at the point where the Alaska-Juneau dam was afterwards constructed and the waters di-

verted and appropriated, as it would have been in connection with the diversion made at the exact point where the said notice of the said L. D. Mulligan was posted, or any other point along Gold Creek in that immediate vicinity, and that none of the work done was wasted or inapplicable or unnecessary in connection with the diversion of the water at the point where the diversion was made, a short distance below the said point where the said L. D. Mulligan posted said notice and below and to the south of the lower side line of the Lotta as indicated by the old stakes above referred to. except that at a time when the plaintiff had a large crew of men at work upon the ground, a tunnel was started and driven a few feet and it was afterwards found that portal of said tunnel was a few feet too high to admit of carrying the water through the same if diverted at the point where the diversion was afterwards made, and a new tunnel was started at a point lower down on a grade finally adopted as the grade for the flume line. At the time said first-mentioned tunnel was being started, however, other men were also employed upon the ground doing other work necessary in connection with the appropriation of the water at the point where the diversion and appropriation was afterwards made, which said work was being carried on simultaneously with the work in connection with the driving of the said first-mentioned tunnel. [54]

And further replying to the allegations of paragraph ten, the plaintiff avers that neither the Ebner Gold Mining Company, nor any other one or all of

the defendant companies or of the defendants, now is or ever was the owner, as referred to in said Answer, of the Parish No. 2 lode mining claim. In this connection the plaintiff avers that on the 8th day of May, 1911, the defendant, the Ebner Gold Mining Company brought an action against the plaintiff, the Alaska-Juneau Gold Mining Company, in the District Court for the District of Alaska, Division Number One, at Juneau, said action being No. 835-A on the docket of said court; that the complaint, answer and reply in said cause are in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835—A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant.

Amended Complaint.

Plaintiff complains of the defendant and alleges:

1.

That the plaintiff is a corporation (organized December 5, 1895), and existing under and by virtue of the laws of the United States provided for the District of Alaska, and is authorized to do and has been engaged and doing a general mining business [55] in said District for over fifteen years.

2.

That the defendant is a corporation duly organized and doing business in the District of Alaska.

3.

That the plaintiff is now and has been for several years last past seized in fee and possessed and entitled to the possession of that certain patented lode mining claim situated in Harris Mining District, District of Alaska, viz.: The Lotta Lode Mining claim, U. S. Mineral Survey No. 87, more particularly described as follows, to wit: Beginning at Corner No. 1, Lotta lode claim (patented), a post at the N. W. center end of claim; thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1, Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast center end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of Old Cabin bears North $5^{\circ} 7'$ east 96,2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. center end and place of beginning. Mag. var. of all courses from a true meridian 32° east of north.

4.

That while plaintiff was so seized, the defendant between the — day of August, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said Lotta lode mining claim, and constructed thereon a dam

and flume for the purpose of conveying from, on [56] and over part of said patented Lotta lode mining claim the waters of Gold Creek flowing in, through and over said Lotta lode mining claim; and ousted and ejected therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

FOR A SECOND CAUSE OF ACTION:

1.

That the plaintiff is a corporation authorized to do and doing business in the District of Alaska, and organized, etc., as mentioned in paragraph 1 of the first cause of action.

2.

That the defendant is a corporation doing business in the District of Alaska.

3.

That the plaintiff is now, and has been for several years last past, seized, possessed and entitled to the possession, and the owner by discovery, location, staking and marking of the boundaries and recording by its grantors, and by a full compliance with the laws of the United States, and the doing and performing of the annual assessment work, of the Parish No. 2 lode mining claim, situate in the Harris Mining District, District of Alaska, and fully described in the location notice thereof of record in book 15 of Lodes, page 157, of the Records of the Juneau Recording District, in the office of the recorder of said Juneau Recording District, in the District of Alaska, as follows, viz.:

Commencing at the notice of location posted on a

post in Gold Creek canyon about 600 feet in a westerly direction [57] from the southwest corner of the Lotta patented claim and running in a southeasterly direction parallel to the said Lotta and the Royal lode claims, patented, and about 300 feet from the same to the end of lode claim, Parish No. 1, being 700 linear feet, and from the location post in a northwesterly direction parallel with the southwest line of the said Lotta lode claim 800 linear feet, together with 300 feet in width of surface ground on each side of the center of the lode line. Side lines are described as follows, viz.: Commencing at the southeast corner marked by a post situated about 125 feet in a southeasterly direction from the southwest corner of the Lotta lode claim and on the southwest side line of the Royal lode claim, thence in a southwesterly direction 600 feet to a post; thence in a northwesterly direction parallel with the southwest side line of said Lotta lode claim 1500 feet to a post, thence in a northeasterly direction 600 feet to the southwest side line of the said Lotta lode claim; thence southeasterly along the southwest side line of the said Lotta lode claim to the southwest corner of said lode claim and 125 feet beyond in the same direction to a post, the point of beginning.

4.

That while plaintiff was so seized and possessed and entitled to the possession of the above-described Parish No. 2 lode mining claim the defendant, between the — day of August, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said Parish

No. 2 lode mining claim hereinabove described, and constructed [58] and built upon, across and over said Parish No. 2 lode mining claim a grade and placed thereon a flume, for the purpose of conveying the waters of Gold Creek over, upon and across the said Parish No. 2 lode mining claim; and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

FOR A THIRD CAUSE OF ACTION:

1.

That the plaintiff is a corporation authorized to do and doing business in the District of Alaska, and organized and existing as stated in paragraph 1 of the first cause of action.

2.

That the defendant is a corporation doing business in the District of Alaska.

3.

That the plaintiff is now, and has been for several years last past, seized, possessed, and entitled to the possession, and the owner by discovery, location, staking and marking of the boundaries, and the doing and performing of the annual assessment work and extensive development by tunnel, etc., and by actual occupation, and by a full compliance with the laws of the United States, of the Cape Horn lode mining claim, situated in the Harris Mining District, District of Alaska, and described as follows, viz:

Commencing at the NE. corner of Cape Horn No. 1 lode, whence the SW. corner of Parish No. 2 lode, Survey No. 934, [59] bears S. 48° 30'

east 329 feet distance; thence along Gold Creek bottom south 45° west 600 feet to the SE. corner of claim; thence N. 45° west 1500 feet to the SW. corner of claim; thence North 45° east 600 feet to NW. corner of claim; thence south 45° east 1500 feet to the NE. corner of claim, and the place of beginning, containing an area of 20.661 acres. The southeast corner of this claim is further described as being in Gold Creek bottom and about 125 feet in a northeasterly direction above the Jualpa dam.

4.

That while plaintiff was so seized, possessed and in the actual occupation, and entitled to the possession, of said Cape Horn lode mining claim, the defendant between the — day of July, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said Cape Horn lode mining claim above described, and erected and built thereon a house or cabin, and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

WHEREFORE plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the premises from which plaintiff has been ousted and ejected by the defendant as in this complaint fully set forth and described.

2. That the defendant be restrained and forever enjoined from interfering with the possession of the plaintiff in and to the mining claims herein described or any part [60] thereof.

3. For costs and disbursements of this action.

4. For such other and further relief as plaintiff may be entitled to receive.

WINN & BURTON,
Attorneys for Plaintiff.

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the first cause of action stated in the amended complaint, admits, denies, and alleges as follows:

1st. The defendant denies each and every allegation in said amended complaint contained with reference to said first cause of action, except that the defendant is a corporation doing business in Alaska.

2d. The defendant alleges that the plaintiff is not a corporation either *de jure* or *de facto*, and has no capacity either to sue or hold property. [61]

3d. That the defendant is the owner of and entitled to the possession of all that certain tract of mining ground situated up Gold Creek, about one mile from the town of Juneau in the District of

Alaska, more particularly described as follows, to wit:

“Commencing at discovery post, thence south 14 degrees west 100 feet to post No. 1, center of south end line lying on north side line of Colorado lode, U. S. S. 612; thence north 84 degrees east 300 feet to post No. 2; thence north 14 degrees east 1500 feet to post #3; thence south 84 degrees west 600 feet to post #4; thence south 14 degrees west 1500 feet to post #5, identical with corner #5 Colorado lode; thence north 84 degrees east 300 feet to post #1.”

—which said mining ground is held and claimed by this defendant under and by virtue of a certain lode mining location made by J. P. Corbus in the month of October, 1899, and known as the Oregon mining claim, and also by virtue of a certain mining lode location made on July the 20th, 1910, by R. G. Datson, which said location is designated and known as the Oregon lode mining claim; that both of which said mining claims and locations were by mesne conveyances conveyed to this defendant and this defendant is now the owner thereof.

4th. That the defendant is the owner, in the possession of and entitled to the possession to a certain patented lode mining claim U. S. Survey #641, contiguous to the Oregon lode mining claims above described and more particularly bounded and described as follows: [62]

“Beginning at Cor. No. 1 Colorado lode, identical with Cor. No. 4 Royal lode Sur. No. 238, S. E. Loc. Cor. Colorado bears S. 33.45 E. 77.64 feet, U. S. Loc. Mon. No. 2, situated in Silver

Bow Basin, bears 86.47 E. 5817 feet distance; thence S. 56.1 W. along 2-3 Nevada lode Sur-#612, 86.30 feet to Cor. No. 2, identical with Cor. No. 2 Survey #612; thence S. 41.15 E. along line 2-1 Nevada lode Sur. #612, 34.96 feet to corner No. 3; thence S. 84.00 W. 1381.75 feet to Loc. Cor. #4; thence N. 33.45 W. 600 feet to Loc. Cor. No. 5; thence N. 84.00 E. along creek bottom 1474.11 feet to Loc. Cor. No. 6; thence S. 33.45 E. 522.36 to Cor. No. 1, the place of beginning, containing an area of 17.862 acres Var. 30 Deg. 60 Min. E.”

5th. The defendant further alleges that at the time of making the discovery thereon hereinafter referred to the ground hereinafter described as being within the boundaries of the Canyon vein or lode was open, unoccupied, unexplored public land of the United States, save and except as to any claim of the defendant Alaska-Juneau Gold Mining Company. That during the month of October, 1910, to wit, on the 8th day of October, 1910, one W. R. Lindsay, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals within the exterior boundaries of the said Canyon vein or lode claim as hereinafter described, and the said W. R. Lindsay did thereupon locate the lode or vein within which the said mineral was so discovered by him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time thereafter and as soon as the necessary surveying [63] could be done, post

a notice on the ground and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 18th day of October, 1910. The claim so located was named and designated as the Canyon vein or lode; that the said Canyon vein or lode so located and situated is near or above the head of the Last Chance Basin, in the Harris Mining District, and is more particularly described as follows, to wit:

“Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line so described. This claim is bounded on its northwesterly side by the Lotta lode mining claim U. S. Lot No. 87.”

6th. The defendant further alleges that its dam referred to in the amended complaint as being upon ground owned by the plaintiff, is in truth and in fact situated upon and within the boundaries of the defendant's above-described Oregon and Canyon lode mining claims. And that the flume referred to in said amended complaint is situated upon and within the boundaries of the defendant's said Oregon, Canyon and Colorado lode mining claims, extending from said dam over and across said Oregon and Canyon claims until it reaches the point where said Oregon

and Colorado claims adjoin, from which point it extends across [64] said Colorado claim until it reaches the compressor plant of the defendant, situated upon said Colorado claim, where the waters of Gold Creek conveyed thence by means of said flume are utilized.

7th. And the defendant further answering said first cause of action stated in the amended complaint herein, alleges: That on the 17th day of November, 1910, it commenced a suit to quiet the title to its above-described Oregon lode mining claims, and to all the ground embraced within the boundaries thereof, and that on the 21st day of November, 1910, it commenced a suit to quiet the title to its above-described Canyon lode mining claim and to all the ground embraced within the boundaries thereof which suits were brought in the District Court for the District of Alaska, Division No. 1, at Juneau, against the pretended corporation styled the Ebner Gold Mining Company, the plaintiff herein, and others. That the subject matter in dispute between the parties in said suits and the subject matter in dispute in this action are the same and identical. That said suits so brought are still pending and undecided, and were so pending and undecided at the time this action was brought.

The defendant for answer to the second cause of action stated in the amended complaint, admits, denies and alleges as follows:

1st. The defendant denies each and every allegation in said amended complaint contained with reference to said second cause of action, except that the defendant is a corporation doing business in Alaska.

2d. The defendant alleges that the plaintiff is not a corporation either *de jure* or *de facto*, and has no capacity either to sue or hold property. [65]

2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and benefit of said Parish No. 2 lode claim under or by virtue of said alleged location of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendants as hereinafter set forth and have failed to record the affidavit of annual labor and improvements required by statute, and thereby the plaintiff's claim, if any he had, became and was actually forfeited.

3d. That the defendant is the owner of and entitled to the possession of all that certain tract of mining ground situated up Gold Creek, about one mile from the town of Juneau in the District of Alaska, more particularly described as follows, to wit:

“Commencing at discovery post, thence south 14 degrees west 100 feet to post No. 1, center of south end line lying on north side line of Colorado lode U. S. S. 612; thence north 84 degrees east 300 feet to post No. 2 thence north 14' de-

degrees east 1500 feet to post #3; thence south 84 degrees west 600 feet to post #4; thence south 14 degrees west 1500 feet to post #5, identical with corner #5 Colorado lode; thence north 84 degrees east 300 feet to post #1." [66]

—which said mining ground is held and claimed by this defendant under and by virtue of a certain lode mining location made by J. P. Corbus in the month of October, 1899, and known as the Oregon Mining claim, and also by virtue of a certain mining lode location made on July the 20th, 1910, by R. G. Datson, which said location is designated and known as the Oregon lode mining claim; that both of which said mining claims and locations were by mesne conveyances conveyed to this defendant and this defendant is now the owner thereof.

4th. That the defendant is the owner, in the possession of and entitled to the possession a certain patented lode mining claim U. S. Survey #641, contiguous to the Oregon lode mining claims above described, and more particularly bounded and described as follows:

“Beginning at Cor. No. 1 Colorado lode, identical with Cor. 4 Royal lode Sur. No. 238, S. E. Loc. Mon. No. 2, situate in Silver Bow Basin, bears 86.47 E. 5817 feet distance; thence S. 56.15 W. along 2-3 Nevada lode Sur. #612, 86.30 feet to Cor. No. 2, identical with Cor. No. 2, Survey No. 612; thence S. 41.15 E. along line 2-1 Nevada lode Sur. #612, 34.96 feet to corner No. 3; thence S. 84.00 W. 1381.75 feet to Loc. Cor. #4; thence N. 33.45 W. 600 feet to Loc. Cor. No. 5; thence

N. 84.00 E. along creek bottom, 1474.11 feet to Loc. Cor. No. 6; thence S. 33.45 E. 522.36 to Cor. No. 1, the place of beginning, containing an area of 17.862 acres — var. 30.00 E.”

5th. The defendant further alleges that at the time of making the discovery thereon hereinafter referred to, the [67] ground hereinafter described as being within the boundaries of the Canyon vein or lode was open, unoccupied, unexplored public land of the United States, save and except as to any claim of the defendant, Alaska-Juneau Gold Mining Company. That during the month of October, 1910, to wit, on the 8th day of October, 1910, one W. R. Lindsay, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals within the exterior boundaries of the said Canyon vein or lode claim as hereinafter described, and the said W. R. Lindsay did thereupon locate the lode or vein within which the said mineral was so discovered by him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time thereafter and as soon as the necessary surveying could be done, post a notice on the ground and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 18th day of October, 1910. The claim so located was named and designated as the Canyon vein or lode; that the said Canyon vein or lode so located and situated is near or above the head of the Last Chance Basin, in the

Harris Mining District, and is more particularly described as follows, to wit:

“Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each [68] side of the center line so described. This claim is bounded on its northwesterly side by the Lotta lode mining claim U. S. Lot No. 87.”

6th. The defendant further alleges that its dam referred to in the complaint as being upon ground owned by the plaintiff is in truth and in fact situated upon and within the boundaries of the defendant's above-described Oregon and Canyon lode mining claims. And that the flume referred to in said complaint is situated upon and within the boundaries of the defendant's said Oregon, Canyon and Colorado lode mining claims, extending from said dam over and across said Oregon and Canyon claims until it reaches the point where said Oregon, Canyon and Colorado claims adjoin, from which point it extends across said Colorado claim until it reaches the compressor plant of the defendant situated upon said Colorado claim, where the waters of Gold Creek conveyed thence by means of said flume are utilized.

7th. And the defendant, further answering said second cause of action, stated in the amended complaint herein, alleges: That on the 17th day of

November, 1910, it commenced a suit to quiet the title to its above-described Oregon lode mining claims and to all the ground embraced within the boundaries thereof, and that on the 21st day of November, 1910, it commenced a suit to quiet the title to its above-described Canyon lode mining claim and to all the ground embraced within the boundaries thereof, which suits were brought in the District Court for the District of Alaska, Division No. 1, at Juneau, against the pretended corporation styled the Ebner Gold Mining Company, the plaintiff [69] herein, and others. That the subject matter in dispute in this action are the same and identical. That said suits so brought are still pending and undecided, and were so pending and undecided at the time this action was brought.

The defendant, further answering said second cause of action stated in the amended complaint, alleges:

1st. That the defendant, the Alaska-Juneau Gold Mining Company, is engaged in the business of opening up, developing and operating mines situated at or near Silver Bow Basin, in the District of Alaska, and that said corporation is the owner of and in the possession of a large group of mining claims, composed of thirty-one (31) patented and a considerable number of unpatented claims, situated in and near Silver Bow Basin, along Gold Creek, above the town of Juneau, in the District of Alaska. That said defendant has for many years past been operating its mines and developing the same.

2d. That the said Alaska-Juneau Gold Mining

Company, the defendant herein, has for many years last past been engaged in extracting the ore from its said mines and in developing the same, and has in connection with such work erected such mills and other appliances as were necessary to mill and extract the gold from the ore mined, and has in connection with its mining operations erected a thirty-stamp mill upon its said property, and pressed the development work done on said mines with all convenient speed, with a view of erecting other and larger mills and increasing its facilities for treating the ore extracted; that the development work done in connection with said [70] mining operations has been carried so far that the erection of a two hundred-stamp mill is now necessary to successfully carry on its said mining operations. With this end in view, the said defendant corporation has laid out a plan which includes the erection and construction of a two hundred-stamp mill on the shore of the Gastineau Channel, immediately below the town of Juneau, and the building of a tramway from said mill along the proposed route, extending from said mill to a point on the Colorado lode mining claim, which said last-mentioned Colorado lode mining claim is owned and possessed by the said Alaska-Juneau Gold Mining Company, and lies adjacent to and joins the Oregon and Canyon lode mining claims above described, which said tramway will at its terminal connect with a tunnel to be driven from the point where such connections are made through various lode mining claims, the property of the said Alaska-Juneau Mining Company, to the point where

the mining operations of said company are now being carried on. That there is flowing through, over and upon the above-described Oregon and Canyon lode mining claims a small creek carrying on an average, approximately 25,000 or 30,000 miner's inches of water; that said creek enters the said Oregon lode mining and Canyon claims across its northerly end line and flows thence southerly across said claims; that the waters of said creek so flowing across the said Oregon and Canyon claims were, on or about the first day of August, 1910, unappropriated, unused and unclaimed by any person or persons whatsoever and were flowing across said claims in their natural channel and thence on down through the Last Chance Basin and through Gold Creek Canyon into Gastineau Channel, and arm of the Pacific Ocean. That the Alaska Electric Light and Power [71] Company has appropriated and are using a small portion of the waters of said Gold Creek, diverting the same at a point approximately one-half mile below the point where the said Gold Creek passes out of the boundaries of the said Oregon and Canyon lode mining claims; that there are no other appropriators or users of the waters of said Gold Creek at any place between the point where the said creek enters the said Oregon and Canyon lode mining claims at its upper end and the mouth of said creek except the small portion diverted and used by the said Electric Light & Power Company as aforesaid; that all the remaining waters in the said creek on the said first day of August, 1910, were unappropriated and open to appropriation for bene-

ficial uses, and that on or about the said first day of August, 1910, while the said waters of said Gold Creek were thus unappropriated and unused, except in so far as they were appropriated and used by the said Alaska Electric Light & Power Company as aforesaid, one L. D. Mulligan, acting as agent and employee of the defendant, the Alaska-Juneau Gold Mining Company and for and on behalf of said company, located the unappropriated waters of said Gold Creek thus flowing therein as aforesaid, 20,000 miner's inches, to be diverted at a point on said Oregon lode mining claims, a short distance below the lower side line of the Lotta lode mining claim referred to in the plaintiff's amended complaint herein, and did then and there post a notice of his said locations, which said notice of location is in words and figures as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States, and over [72] the age of twenty-one years, have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910.”

That said notice of location was signed by said

L. D. Mulligan in person, wherefore and whereupon, and on the 2d day of August, 1910, the said Mulligan made, executed and delivered to the said Alaska-Juneau Gold Mining Company his certain deed in writing, conveying to the said corporation all his right, title and interest in the waters so appropriated, which said deed of conveyance was made and executed for the purpose of vesting in the said corporation the legal title standing in the name of the said Mulligan, who, although acting as agent of the said corporation, signed said notice of appropriation in his own name. That said notice of appropriation was thereafter, and on the 8th day of August, 1910, duly and regularly recorded in the office of the District Recorder of the Juneau Recording District; the same being the district wherein said Gold Creek is located; that said notice of location was posted at or near the proposed point of diversion on the Oregon lode and Canyon lode mining claims [73] above described; that immediately after the posting of said notice, and upon the said 1st day of August, 1910, the said Alaska-Juneau Gold Mining Company commenced work looking towards the diversion and appropriation of the waters flowing said Gold Creek over and above any excess appropriated by the said Alaska Electric Light & Power Company to the extent of 20,000 miner's inches as claimed in said notice, and that a crew of men has been continuously at work in the construction of pipe, flume and ditch lines as well as the construction of a dam at the point of diversion, all of which dam, pipe, flume and ditch lines are intended to and will be

used for the purpose of so diverting the said waters of Gold Creek appropriated and located as aforesaid, and such work in connection with the diversion of said waters has been carried on by said company with as much speed as the conditions would permit of and without cessation or delay, and is still being so carried on, and will be pressed forward until the waters have been diverted and applied in accordance with the original intention; that the waters so appropriated were appropriated for the purpose of generating power and for other beneficial uses in connection with the operation of the two hundred-stamp mill to be built on the shore of Gastineau Channel as hereinbefore stated, and for the purpose of driving a compressor plant situated on the Colorado claim and for other uses in connection with its mining operations; that it is the intention and purpose of the said defendant, the Alaska-Juneau Gold Mining Company, to press the work of diverting the said waters and of conducting the same through pipes and flumes to the said proposed mill with as much speed as the weather and other conditions will admit of and without cessation [74] or delay, and to erect said mill and have the same in readiness, and to commence the construction of said mill as soon as the necessary material can be obtained and placed upon the ground, and to press said work to completion, and it is the intention of the said company to divert the waters of Gold Creek by means of said dam, flumes and pipe lines as soon as the weather and other conditions will permit, and to apply the same in connection with the operation

of said two hundred-stamp mill and said other uses, the same being the beneficial uses designed. That the use of all the said waters so appropriated to the extent of said entire 20,000 inches will be necessary in the operation of the said mill. That the dam situated on the Oregon and Canyon claims as afore-said has been completed as well as the flume line extending from said dam over and across said Oregon and Canyon claims to a point on the Colorado claim above described, where a compressor plant has been constructed by the defendant; that the waters of Gold Creek have been diverted by means of said dam and are now being conveyed to said compressor plant by means of said flume, where the same are applied and used for the purpose of generating power used by the defendant in driving the tunnel hereinbefore referred to, and for other purposes in connection with the construction of such works as are necessary in order to carry out its above referred to scheme of development adopted in connection with the operation of its mine. That on the 8th day of May, 1911, the defendant posted its amended notice of appropriation of the water already appropriated and claimed under the notice above set out, which said amended notice was posted at the point of diversion as described [75] and located in said notice, and was thereafter and on the said 8th day of May, 1911, duly and regularly recorded in the office of the recorder for the Juneau Recording District, the same being the district in which all the points herein referred to in connection with the water so to be appropriated and the use

thereof are situated. Said amended notice so posted and recorded is in the words and figures as follows:

“NOTICE IS HEREBY GIVEN that, whereas, the Alaska-Juneau Gold Mining Company did, by its agent, L. D. Mulligan, *posting* a notice from the waters appropriating 20,000 inches of water from the waters flowing in Gold Creek, which notice is in words and figures as follows:

‘KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan of Alaska, a citizen of the United States and over the age of twenty-one years, have appropriated and claimed 20,000 miner’s inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st, 1910.’

And whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue [76] of such agency and by virtue of conveyances from said Mulligan:

Now, therefore, the undersigned, not waiving any of its right or abandoning any of the rights belonging to it under and by virtue of said above-described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done

pursuant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice and of the means whereby the same is to be conveyed to such place of intended use, hereby posts and records this additional and amended notice of appropriation of water and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original notice as well as this amended notice 20,000 miner's inches of the waters of Gold Creek measured under a four-inch pressure for mining, milling power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold Creek about one mile and one-eighth ($\frac{1}{8}$) above the town of Juneau about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above-mentioned location notice, signed by L. D. Mulligan. The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyances, along [77] a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgenson sawmill, on the shore of Gasti-

neau Channel, where the same is to be applied and used for the purpose of generating power and for other purposes to be used in connection with the operation of a stamp-mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor plant at that point and for the purpose of generating power at that point and these waters so used on said Colorado claim will be conveyed by a pipe, flume, ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary at said last-mentioned place if used for the purpose of furnishing power at that point as above stated. The remainder of the water carried not used at this point, at any time to be applied in connection with the operation of the stamp-mill to be built near the Jorgenson sawmill as above stated.

Notice is expressly given that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Mulligan or by virtue of any of the work it has heretofore performed looking towards the diversion and appropriation of the waters of Gold Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8th day of May, 1911.

ALASKA-JUNEAU GOLD MINING CO.

By ROBERT A. KINZIE,

Agent and General Superintendent." [78]

3d. That said flume and ditch used for the diver-

sion of the waters of Gold Creek as aforesaid is constructed over and across a portion of the Oregon and Canyon claims in conflict with the alleged Parish No. 2, claim as described in the complaint.

4th. That the pretended Parish No. 2 and Oregon and Canyon claims are all unpatented mining claims, and the ground within the boundaries of said claims wholly belongs to the unpatented public domain of the United States, claimed under said pretended Parish No. 2, Oregon and Canyon locations but not otherwise claimed, located or held by anyone except the United States, and has never been in the actual and physical possession of anyone except the defendant.

5th. That in order that the mines of the Alaska-Juneau Gold Mining Company may be worked to advantage, it is necessary that the plans above delineated and described be carried out to its fullest extent in every detail and that the water of Gold Creek be conveyed to the proposed site of the mill to be erected and there used to generate the power with which said mill can be operated, and also that said water be conveyed to the compressor plant now situated on the Colorado plant and there used for the purpose of generating power and other purposes and uses in connection with the driving of the tunnels above described and the operation of the mines. That the water of Gold Creek cannot be diverted and carried to either point and applied to the uses indicated, unless the same be diverted approximately at the point where the dam is now built and where the same are now being diverted and carried

by means of pipes, flumes and ditches along the ditch and flume-line above described extending over [79] and across the land embraced within the unpatented Oregon claims and the other pretended unpatented conflicting claims and the said water cannot be diverted and appropriated for use in connection with the operations of the defendant's mines, unless a ditch, flume and pipe-line be built across said ground and along the route indicated above from the point of diversion to the place of use.

6th. That gold was first discovered in Alaska in about the year 1880, that some of the mining claims now opened and operated by the defendant's company were the first quartz locations made in the District of Alaska and were made at about that time. That the newly discovered district was named the "Harris Mining District," after its discoverer. That the topographical and climatic conditions of Southeastern Alaska, the territory in which the new discovery was made were such that the soil was not adapted for any other purposes, except that here and there some small gardens may possibly be made where some few vegetables that need not be ripened in order to make them fit for use could be produced, and that the doctrine of riparian right was wholly inapplicable to the territory of Alaska and to the conditions obtainable there. That Gold Creek as well as all and singular the property rights and other places connected with the same to which reference is made in this answer are situated within the boundaries of the Harris Mining District. That at a meeting of the miners of the Harris Mining

District held in the year 1882, the miners of said district duly and regularly adopted the following rules with reference to the diversion and appropriation of water: [80]

“Article 1. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Art. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Art. 3. The person entitled to the use may change the place of diversion, if others are not injured by such change and may extend the ditch, flume, pipe or aqueducts by which the diversion is made to place beyond that where the first use was made.

Art 4. A water appropriation may be turned into channel of another stream and mingled with its waters and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

Are. 5. As between appropriators, the one first in time is the one first in right.

Art. 6. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: First: He claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure. Second: The purpose for which he claims it, and the place of intended use. A copy of the notice must within ten (10) days after

it is posted be recorded in the books kept by the recorder of the district.

Art. 7. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavations or construction of the works, in which he intends to divert [81] the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Art. 8. By 'completion' *it* is meant conducting the waters to the place of intended use.

Art. 9. By a compliance with the above rules, the claimant's right to the use of the water related back to the time the notice was posted.

Art. 10. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

Art. 11. Persons who have heretofore claimed the right to water and who have not diverted nor applied it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases."

That all and singular said rules and regulations have been and remain in force and have been universally observed by the miners of the Harris Mining District at all times since and are still being so observed and are in all respects in full force and effect.

7th. That ever since the discovery of gold in Alaska as above indicated, and up to the present

time, certain customs have been in force and have been observed universally by the miners of the Harris Mining District, the same being the district within which Gold Creek and all and singular the matters in dispute in this action are situated, and also by the miners in the territory outside of the said Harris Mining District, lying in [82] the vicinity of Juneau as well as all the various mining districts lying in *which* is known as Southeastern Alaska, That according to the customs of the miners of said territory so described the riparian owner requires no right to the water flowing within the stream by reason of such ownership, but the right to the use of such water could and can be acquired only by diversion, appropriation and application to a beneficiary use. That all and singular the rules adopted by the miners of the Harris Mining District as above indicated were and are observed by all the miners in the territory known as Southeastern Alaska, and all and singular the rights and liabilities conferred by or existing under, or by virtue of said rules, existed and are recognized by the customs of the miners of Southeastern Alaska, which said customs are uniformly and universally recognized and adhered to by all the miners residing in or operating within said territory embraced in what is known as Southeastern Alaska, and like customs are also recognized and existing in all the various districts within the territory of Alaska. That, by these customs of the miners, right to the use of water can be acquired only in the manner indicated by the rules of the miners above referred to and the failure to

comply with these rules and customs in accordance with the customs of miners above referred to, work a forfeiture against whoever fails to comply with said rules and customs and according to said customs, all rights are forfeited by the person acquiring the same upon a failure on his part to take any one or more of the succeeding steps, required to be taken by him under said rules and customs; that is, the rules adopted by the miners of the Harris Mining District as [83] above stated are in all respects identical with the customs of the miners universally observed and recognized by the miners in all mining districts of Southeastern Alaska, including the Harris Mining District, and also recognized by the miners of the entire Territory of Alaska in accordance with said customs that the riparian proprietor has no right as such to the use of the water flowing in the stream and the right thereto can be acquired only in the manner above indicated.

That according to the customs of the miners, recognized and observed in the Harris Mining District as well as in all the other mining districts above referred to, including all mining camps situated in *the* Southeastern Alaska, the right to construct ditches and flumes to be used in connection with the diversion and appropriation of water, over and across all portion of the public domain of the United States claimed by mineral claimants, whether said ground be claimed and held under lode placer location, exists and is recognized and has existed and has been recognized at all times since gold was first discovered in Alaska, under which said

custom each miner or person operating a mine has a right to go upon the unpatented mining claims of others and construct ditches and flumes over and across the same for the purpose of diverting and appropriating water and conveying the same to a beneficial use connected with the operation of his mine, the sluicing of his gravel or the milling of his ores.

That all and singular the above referred to customs and rights existing thereunder are universally and uniformly observed and recognized by all the miners residing, not only in the Harris Mining District, but in all the various mining districts of Southeastern [84] Alaska, as well as those of other portions of the territory of Alaska, and have been recognized and have so existed as long as mining operations have been carried on in any and all the various districts.

8th. That the work done in the excavation by the defendant's company in no wise damages the ground across which said flume-line has been built, and that the construction and maintenance of said flume-line in no way interferes with the use of the ground across which same has been built for mining or other purposes, and in no wise hinders or interfered with the mining of the ores contained within any of the mining claims across which same has been built or constructed, and add to and in no wise detracts from the value of the same or any of them.

9th. That the right of use of water acquired by diversion, appropriation and application to beneficial use, as recognized by the above-referred to cus-

toms as well as the right to construct ditches and flumes for the purpose of diverting and conveying water, has been and is recognized by the decision of the Courts of Alaska.

WHEREFORE, The defendant prays that the plaintiff's amended complaint be dismissed and that they and each of them recover the costs and disbursements in this behalf incurred.

SHACKLEFORD & BAYLESS,
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant. [85]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835—A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Reply to Answer.

Comes now the above-named plaintiff and replying to the answer herein of the above-named defendant states:

I.

Referring to the second paragraph of said answer, this plaintiff alleges that it is a corporation, organized and existing as stated in the amended complaint herein and has been acting as such corporation transacting business in the said District of Alaska

for more than fifteen years, and has transacted business with the said defendant herein and has at all times been recognized by the said defendant as a corporation and entitled to transact business as such and to perform all the other functions of a corporation.

II.

Referring to paragraph III of said answer, this plaintiff denies the same and each and every portion thereof, and states further in respect to said paragraph that if the said J. P. Corbus ever did undertake to make a location of a mining claim [86] called the Oregon, that said attempted location was made on behalf of and for the said defendant and was attempted to be made over, in and upon the mining claims belonging to the plaintiff set out and described in the amended complaint herein, and was attempted to be made over, in and upon said claims or some portion thereof while the plaintiff herein, or its predecessors in interest, or grantors, were the owners and in possession of each and all of said claims and after the said Lotta claim set forth and described in the amended complaint herein was patented and while the said Parish No. 2 mining claim described in the amended complaint were valid and subsisting claims, held, owned and possessed by the plaintiff herein or its grantors by reason of prior discovery, location, staking and marking of the boundaries, posting of notices and recording of the same and by a full compliance with the laws of the United States pertaining to the performance of annual assessment work thereon, and

that if said Corbus ever attempted to locate the premises described in the answer as the Oregon claim for or on behalf of himself or said defendant, the said attempted location and said claim to the premises described in said answer as the Oregon claim were afterwards abandoned and forfeited by reason of said defendant and its agent and representative, Corbus, failing in all respects to comply with the laws of the United States and local customs, rules and regulations pertaining to the performance of the annual assessment work on said pretended lode mining claim; that the said defendant, nor its predecessors in interest, nor the said Corbus, never performed any assessment work on said claim whatsoever and never attempted to comply with the law [87] in regard to performing the necessary annual assessment work on said pretended location;

And this plaintiff further alleges that if the said R. G. Datson mentioned in said paragraph ever attempted to make any location of what is termed the Oregon Lode mining claim in the year 1910, that said Datson attempted to make the same on behalf of the said defendant herein, and any and all attempted loctions made by the said Datson were in, over and upon the property, mining claims and premises owned and possessed by the plaintiff herein, as set forth and described in the amended complaint, and was an attempt to make a location over, in and upon the Lotta patented claim, the Taku Gold & Silver claim, patented, and the Parish No. 2, the latter mining claim being prior, subsisting and valid locations owned, held and possessed by this plaintiff

by reason of prior discovery, location, marking on the ground, posting and recording of notice and in full compliance with the laws of the United States in respect to holding mineral land and in complying with the law, local rules and regulations pertaining to the performance of annual assessment work thereon, and was an attempt made by the said Datson on behalf of said defendant company to relocate the said pretended Oregon claim as located by the said Corbus, in the manner hereinbefore set forth, and said attempted location by said Datson on the part of said defendant was false, fictitious and void, and was made, as this plaintiff verily believes, to harass and annoy said plaintiff and becloud the title to its said property.

III.

Referring to paragraph IV of the said answer to the [88] amended complaint herein, this plaintiff denies the same and each and every portion thereof, and alleges that if said defendant is the owner and possessed of a certain patented mining claim known as United States Survey 641 and termed the Colorado Claim, the only premises or property that was ever patented by reason of said instrument and the only ground that was ever patented by virtue of said survey as described and located upon the ground by the monuments and actual measurements, irrespective of anything that may be asserted in said patent, is bounded and described as follows, to wit:

Beginning with Corner No. 1 of the Colorado lode, Survey No. 641, identical with Corner No.

4 of the Royal, Survey No. 238; thence south $58^{\circ} 24'$ west 86.30 feet to Corner No. 2, identical with Corner No. 2 of the Nevada Lode, Survey No. 612; thence south $39^{\circ} 06'$ east 34.96 feet to Corner No. 3; thence north $88^{\circ} 30'$ west 1123.16 feet to Corner No. 4 identical with Corner No. 1 of the Idaho Placer, Survey No. 641; thence north $31^{\circ} 36'$ west 600 feet to Corner No. 5, identical with Corner No. 6 Idaho Placer, Survey No. 641 and Corner No. 3 Last Chance Placer, Survey No. 142; thence south $88^{\circ} 54'$ east 1215.12 feet to Corner No. 6 on line 5-4 Royal Lode, Survey No. 238, whence Corner No. 5 Royal Lode bears north $31^{\circ} 36'$ west 567.64 feet, thence south $31^{\circ} 36'$ west 522.36 feet to Corner No. 1, the place of beginning.

That said Colorado claim was patented as a subsequent and junior mining claim to the other mining claims which it lies between, and only as a matter of fact contains the ground embraced [89] within the exterior boundary lines above described and set forth.

IV.

Referring to paragraph V of said answer to the amended complaint, this plaintiff denies the same and each and every portion thereof, and alleges that if the said Lindsay mentioned in said paragraph did attempt to make a location of the premises described in said paragraph as a mining claim, the same was invalid, for the reason that the said attempted location was made on behalf of said defend-

ant by said Lindsay in, over and upon the Lotta patented claim and the Parish No. 2 mining claim, being the same Lotta and Parish No. 2 mentioned and described in the amended complaint herein, and said attempted and pretended location was made at the time that said Lotta was a patented claim, owned and held and in the actual possession of this plaintiff, and while the said Parish No. 2 was owned and held and in the actual possession of this plaintiff, by reason of prior discovery, location, marking of boundaries, posting and recording of notices and while the same was a valid and subsisting mining claim by reason of this plaintiff having complied with all the laws, rules and regulations with respect to performing the annual assessment work thereon, and said location was made for the purpose of harassing and annoying this plaintiff more particularly for the reasons hereinafter set forth in this reply, and also was and is an attempt of defendant to relocate a part of the old Oregon claim, which it has abandoned and forfeited as heretofore alleged in this reply. [90]

IV.

Referring to paragraph VI of the answer to the amended complaint herein, this plaintiff denies the same, and each and every portion thereof.

And this plaintiff replying to the answer of the defendant to the second cause of action set forth in the amended complaint, states and alleges as follows:

I.

That this plaintiff alleges it is a corporation as

stated in the amended complaint herein, and has been carrying on and conducting business in the District of Alaska as alleged in the said amended complaint and set out herein; has dealt with said corporation during said period of time as a corporation, recognizing its legal existence and capacity to hold property and do and transact business in Alaska.

II.

Referring to paragraph III of the answer to the second cause of action herein, this plaintiff denies the same and each and every portion thereof, and states further in respect to said paragraph that if the said J. P. Corbus ever did undertake to make a location of a mining claim called the Oregon, that said attempted location was made on behalf of and for the said defendant and was attempted to be made over, in and upon the mining claims belonging to the plaintiff set out and described in the amended complaint herein, and was attempted to be made over, in and upon said claims or some portion thereof while the plaintiff herein, or its predecessors in interest or grantors, were the owners and in possession of each and all of said claims and after the said Lotto claim, set forth and described in the [91] amended complaint herein, was patented and while the said Parish No. 2 lode mining claim described in the amended complaint were valid and subsisting claims, held, owned and possessed by the plaintiff herein or its grantors, by reason of prior discovery, location, staking and marking of the boundaries, posting of notice, and recording of the

same and by a full compliance with the laws of the United States pertaining to the performance of annual assessment work thereon, and that if said Corbus ever attempted to locate the premises described in the answer as the Oregon claim for or on behalf of himself or said defendant, the said attempted location and said claim to the premises described in said answer as the Oregon claim were afterwards abandoned and forfeited by reason of said defendant and its agent and representative, Corbus, failing in all respects to comply with the laws of the United States and local customs, rules and regulations pertaining to the performance of the annual assessment work on said pretended lode mining claim; that the said defendant, nor its predecessors in interest, nor the said Corbus, never performed any assessment work on said claim whatsoever, and never attempted to comply with the law in regard to performing the necessary annual assessment work on said pretended location.

And this plaintiff further alleges that if the said R. G. Datson, mentioned in said paragraph, ever attempted to make any location of what is termed the Oregon lode mining claim in the year 1910, that said Datson attempted to make the same on behalf of the said defendant herein, and any and all attempted locations made by the said Datson were in, over and upon the property, mining claims and premises owned and possessed by the [92] plaintiff herein, as set forth and described in the amended complaint, and was an attempt to make a location over, in and upon the Lotta patented claim, the

Taku Gold and Silver claim, patented, and the Parish No. 2 lode mining claim, the latter mining claims being prior, subsisting and valid locations, owned, held and possessed by this plaintiff by reason of prior discovery, location marking on the ground, posting and recording of notices and in full compliance with the laws of the United States in respect to holding mineral land and in complying with the law, local rules and regulations pertaining to the performance of annual assessment work thereon, and was an attempt made by the said Datson on behalf of said defendant company to relocate the said pretended Oregon claim as located by the said Corbus, in the manner hereinbefore set forth, and said attempted location by said Datson on the part of said defendant was false, fictitious and void, and was made, as this plaintiff verily believes, to harrass and annoy said plaintiff and becloud the title to its said property.

III.

Referring to paragraph IV of the answer to the second cause of action herein, this plaintiff denies the same and each and every portion thereof, and alleges that if said defendant is the owner and possessed of a certain patented mining claim known as United States Survey 641 and termed the Colorado claim, the only premises or property that was ever patented by reason of said instrument and the only ground that was ever patented by virtue of said survey as described and located upon the ground by the monuments and actual measurements, irrespective

[93] of anything that may be asserted in said patent, is bounded and described as follows, to wit:

Beginning with Corner No. 1 of the Colorado lode, Survey No. 641, identical with Corner No. 4 of the Royal, Survey No. 238; thence south $58^{\circ} 24'$ west 86.30 feet to Corner No. 2, identical with Corner No. 2 of the Nevada lode, Survey No. 612; thence south $39^{\circ} 06'$ east 34.96 feet to Corner No. 3; thence North $88^{\circ} 30'$ west 1123.16 feet to Corner No. 4, identical with Corner No. 1 of the Idaho Placer, Survey No. 641; thence north $31^{\circ} 36'$ west 600 feet to Corner No. 5, identical with Corner No. 6 Idaho Placer, Survey No. 641 and Corner No. 3 Last Chance Placer, Survey No. 142; thence south $88^{\circ} 54'$ east 1215.12 feet to Corner No. 6 on line 5-4 Royal lode, Survey No. 238, whence Corner No. 5 Royal lode bears north $31^{\circ} 36'$ west 567.64 feet; thence south $31^{\circ} 36'$ east 522.36 feet to Corner No. 1, the place of beginning.

That said Colorado claim was patented as a subsequent and junior mining claim to the other mining claims which it lies between, and only as a matter of fact contains the ground embraced within the exterior boundary lines above described and set forth.

IV.

Referring to paragraph V of the answer to the second cause of action herein this plaintiff denies the same and each and every portion thereof, and alleges that if the said Lindsay mentioned in said paragraph did attempt to make a location of the premises described in said paragraph as a mining claim, the

same was invalid, for the reason that the said attempted location was made on behalf of said defendant by said Lindsay in, over and [94] upon the Lotta patented claim and the Parish No. 2 mining claim, being the same Lotta and Parish No. 2 mentioned and described in the amended complaint herein, and said attempted and pretended location was made at the time that said Lotta was a patented claim, owned and held and in the actual possession of this plaintiff and while the said Parish No. 2 was owned and held and in the actual possession of this plaintiff, by reason of prior discovery, location, marking of boundaries, posting and recording of notices and while the same was a valid and subsisting mining claim, by reason of this plaintiff having complied with all the laws, rules and regulations with respect to performing the annual assessment work thereon, and said location was made for the purpose of harassing and annoying this plaintiff, more particularly for the reasons hereinafter set forth in this reply, and also was and is an attempt of defendant to relocate a part of the old Oregon claim, which it has abandoned and forfeited as heretofore alleged in this reply.

V.

Referring to paragraph VI of defendant's amended and supplemental answer this plaintiff denies the same and each and every allegation therein contained.

Referring to the further answer of defendant to the second cause of action stated in the amended complaint, this plaintiff admits, denies and alleges as follows:

I.

Referring to paragraph I thereof, this plaintiff has not knowledge or information sufficient to form a belief as to [95] the matters and facts set forth therein, and therefore denies the same and each and every portion thereof.

II.

Referring to paragraph II of the said further answer, this plaintiff denies the same and each and every portion thereof, except in so far as it has been in this reply or may be hereafter admitted, modified or explained. And in connection with said paragraph and the matters set forth therein this plaintiff further alleges, that if the said L. D. Mulligan ever posted a notice of the kind and nature set forth on page 10 of said answer, purporting to be dated August 1, 1910, that said notice was posted at a point fully 150 feet up Gold Creek from where the defendant has constructed its dam and was posted near the center of the patented Lotta lode claim herein referred to, and said notice and all work thereunder was abandoned by the said defendant and was never of any validity as a water notice and was posted upon the patented ground of this plaintiff company, and for said reasons mentioned herein was absolutely void both in law and in fact.

This plaintiff referring to said paragraph and the pretended amended location notice of appropriation of water, which commences on page 13 and ends on page 15, alleges, that if any such notice was ever made out and posted by the said defendant and was posted as indicated in said notice, it was posted at a

distance down the creek from the original notice which the said Mulligan claimed he posted, a distance of about 150 or 200 feet, and was either on the Lotta patented claim or the Parish No. 2 mining claim, property of this plaintiff company, and that said pretended notice, if posted and recorded as is claimed by the defendant, [96] is of no validity whatever as a water location or as an amended water location, for the reasons set forth herein.

III.

Referring to paragraph III of said last-mentioned answer, this plaintiff denies the same and each and every portion thereof, except that said flume and ditch referred to therein is constructed across a part of and in part over the Parish No. 2 claim and was so constructed in the manner hereinafter set forth.

IV.

Referring to paragraph IV, this plaintiff admits that the Parish No. 2 mining claim is an unpatented claim, but denies each and every other portion, part and remaining allegation of said fourth paragraph.

V.

Referring to paragraph V of said last-mentioned answer, this plaintiff denies the same and each and every portion thereof.

VI.

Referring to paragraph VI of said answer, this plaintiff denies that the pretended rules and regulations set forth in said paragraph are now or ever have been in force since either party to this action sought to acquire title to any of the property described and set forth in the pleadings herein; denies that any such rules and regulations ever have been

universally or otherwise observed by the miners of the Harris Mining District, at this time or any other time, or that they are now or ever have been in force and effect; as to the remaining portions of said paragraph VI, this plaintiff has not knowledge or information [97] sufficient to form a belief as to the matters and facts set forth therein, and therefore denies the same and each and every portion thereof.

And this plaintiff further alleges in connection with the matters and facts set forth in said paragraph, that if any such mining rules or regulations were ever in existence, they were specially repealed by the Act of May 17, 1884, being an Act entitled "An Act Providing a Civil Government for Alaska," 23 Stats. at Large, which provided for the organization of a civil government in Alaska, the extension thereof of the laws of Oregon and in section 8 as follows: "And the laws of the United States relating to mining claims and the rights incident thereto shall, from and after the passage of the act, be in full force and effect in said district under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President."

And if any such mining rules or regulations as set forth in said paragraph ever existed or were in force, they fell into utter disuse and were abandoned before either party to this suit ever made any claim to any of the unpatented land or mining claims in dispute in this action, and any of said mining rules so set forth therein that are inconsistent with the general laws of the United States are of no force or effect whatsoever.

That none of said rules or regulations that are inconsistent with the laws of the United States have ever been recognized by the Courts of the District of Alaska since either party to this action made any claim to the property in dispute herein; in fact, the Courts have held that if any such rules and regulations ever did exist, that they fell into disuse long before [98] either the plaintiff or the defendant in this suit made any claim to the property in dispute herein, and particularly so was it held in the case of *McFarland et al. vs. The Alaska Perseverance Mining Co.*, No. 510-A of this court, by Judge James Wickersham, the presiding Judge, and which opinion is on file in said cause; the said cause was afterwards appealed to the Circuit Court of Appeals and the decision of the said Wickersham affirmed. Said opinion was rendered by the said Wickersham on June 3, 1907, and was over mining property and water rights within what the defendant herein terms the Harris Mining District and within a short distance from the property in dispute in this suit.

VII.

Referring to paragraph VII of said answer, this plaintiff denies the same and each and every portion thereof, and states that if any of said customs mentioned in said paragraph ever existed, the same, by reason of the facts set forth in paragraph VI of this Reply, were repealed and are of no force and effect, and had fallen into utter disuse before ever either of the parties herein made any claim to the mining claims or any water or water rights as set forth in said answer.

VIII.

Referring to paragraph VIII of said answer, this plaintiff denies the same and each and every portion thereof.

IX.

Referring to paragraph IX of said answer, this plaintiff denies the same and each and every portion thereof.

And further by the way of affirmative matter as a defense [99] to the matters and facts set forth in the amended and supplemental answer to the amended complaint herein, this plaintiff alleges:

I.

That it is a corporation organized and existing as heretofore alleged in this reply, and said allegations respecting said corporation are hereby referred to and made a part of this part of this reply.

II.

That this plaintiff is a corporation organized as hereinbefore stated and came into existence in the year 1895, and at that time and since that time has become the owner and has been in possession of a group of quartz mines and mining claims in what is termed the Harris Mining District, on Gold Creek, a distance of about one mile from the town of Juneau; all of which said claims are contiguous and adjacent to each other, with no intervening ground or mining claims owned or possessed by any other person or corporation; and said group consists of the Lotta patented claim, set forth in the complaint herein, and some seven or eight other patented claims and the Parish No. 2 and Parish, two unpatented

claims referred to in the complaint herein, together with several other unpatented claims and several mill sites.

That the creek known as Gold Creek and referred to in the pleadings herein runs through and across said mining claims for a distance of about three-quarters of a mile.

That before this plaintiff company became the owner and possessed of said mining claims and mill sites, some of the said claims had been owned and possessed by this plaintiff's predecessors [100] in interest and grantors, and they had erected on one of said claims or mill sites, at or near the upper end of said group on Gold Creek, a ten-stamp mill and were engaged for several years before this plaintiff became the owner of said property in opening up and developing said mining claims and in mining and milling the ore therefrom, and had all the necessary machinery and equipment for mining and milling the ore in said ten-stamp mill and did run and operate said mill for several years prior to this plaintiff becoming the owner of said property and used the water of Gold Creek for the purpose of generating power, in opening up and developing said mines and milling said ore, and said creek was tapped by the intake of the predecessors in interest and grantors of this plaintiff at a point just above the mill, which said mill is located on the right-hand bank going up the creek.

III.

That about the year of 1895, upon the organization of this plaintiff as a corporation, the property above

described, except a few locations that have been made since then, were conveyed to said corporation.

That the locations that have been made by and on behalf of this plaintiff, or conveyed to it, since said date are the Parish No. 2 claim and Parish, and which was located by William M. Ebner on the 24th day of October, 1899, and afterwards and on the 29th day of March, 1906, conveyed by the said Ebner to this plaintiff; conveyed to this plaintiff, and ever since said date said two mining claims have formed a part of the group of the property referred to herein as the plaintiff's property on [101] Gold Creek; and said plaintiff has been in the open, notorious and actual possession of all of said property during all of said times mentioned herein and ever since the conveyance of said Parish No. 2 and the Parish to it, and ever since it first became the owner of said property in 1895, has been continuously engaged in opening up and developing and mining of its said property, milling its ore with its said 15-stamp mill, and has built and constructed necessary ore-bunkers, an air-compressor and all necessary buildings, and had the necessary machinery placed thereon for the working of said mines in a good workmanlike style and fashion, and has been using the water of Gold Creek at all of said times to generate power therefore.

IV.

That in contemplation of the increasing of the facilities to open up, develop and mine said property and the milling of said ores, this plaintiff located, or caused to be located, for itself and successors in interest, ten thousand additional miner's inches of water

of Gold Creek, on the 20th day of June, 1910, which said location was made by H. T. Tripp for and on behalf of this plaintiff and its successors in interest and afterwards recorded in the recorder's office at Juneau, Alaska, that being the Recording District, in which said mining property is situated, and which said location notice reads as follows, to wit:

“Location of Water.”

“Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miner's inches of the water flowing in this creek or any part of 10 thousand miner's inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the [102] southerly side or to cross the creek with pipe or flume or both to any place on the property known as the Ebner Mine or to carry across or further then the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner Dam about $1\frac{3}{4}$ miles up from Juneau, Alaska, on Gold Creek.

“Dated this 20th day of June, 1910.

“Time 7:30 A. M.

“Locator — H. T. TRIPP.

“Witness:

“JOHN SOINI.”

V.

That at the time of making said water location it was also in contemplation of this plaintiff and its successors in interest to build a 20-stamp mill at the lower end of its property on the left bank of Gold Creek going up said Creek, on the Cape Horn lode

mining claim, and to convey the water from a point on Gold Creek at or near where said notice was posted to said new mill and to such other points on Gold Creek as were necessary for the prosecution of the work of mining said property and milling the ores therefrom, and that in pursuance of said plan a survey was commenced on or about the last of July, 1910, of a flume-line from the point on Gold Creek at which said notice was posted to the mill site, a distance of about 4,000 feet; all of which was done prior to any pretended location of water of Gold Creek by the defendant. That said work of enlarging the facilities and increasing the capacity of the mill for the purpose of mining said property and treating the ores therefrom was, and has been, continuously kept up from the time of commencing the same to the present time, and [103] up to the present time the said flume-line has been about completed, being built upon the left bank of Gold Creek going up said creek, and is a flume three feet by four feet and over 4,000 feet long, with a capacity to carry over — miner's inches of water, and the excavation for the foundation of said mill has been nearly completed and the timber frames for a 200-stamp mill shipped and now on the ground at Juneau, which includes timbers for the mill building, ore-bins and batteries; that part of the machinery for said mill has also been purchased and shipped and is on the ground at Juneau, as well as a 20-drill compressor plant, and a tunnel run from the proposed site of the new mill in and through said mining property for a distance of 400 or 500 feet, which said tunnel is 8 feet by 8 feet, and is intended

for the purpose of opening up the ore bodies to be milled and treated by said 200-stamp mill. That during all of said time and from the commencement of said work and down to the present time there has been kept employed on said property from 20 to 60 men constructing the flume and performing other necessary work for the completion of said undertaking.

VI.

That while said work of plaintiff was progressing as aforesaid, the said defendant, by its officers, agents and representatives, attempted to wrongfully enter upon the said Lotta patented lode mining claim and the Parish No. 2 lode mining claim and take possession of a portion of said mining claims against the will and consent of this plaintiff, and in order to prevent said wrongful entry and trespass upon said mining claims by said defendant, its agents and representatives, this plaintiff [104] commenced an action, being Cause No. 803-A of this court, and made application for a temporary restraining order, restraining the said defendant from trespassing upon the property of this defendant, and especially the Lotta patented claim and the Parish No. 2 mining claim; that upon the hearing thereof this Court refused said restraining order upon the grounds that there was a dispute as to the title to the property in controversy, and that the plaintiff could suffer no irreparable damages by reason of the acts complained of, and that plaintiff's remedy would be by an action in ejectment.

VII.

That thereafter and on or about the 28th day of

September, 1910, while the work above mentioned was in progress, and while this plaintiff, by its representatives or agents, was in the actual possession of the said Lotta patented mining claim mentioned herein, and performing work thereon in the building of trails, etc., the said defendant by its officers, agents and employees, attempted to go upon the said Lotta patented claim and to construct and build a dam in Gold Creek on said claim and about the center of said claim, and they were requested and ordered to depart from said premises by the representatives of this plaintiff, and they did so depart and move away from said premises, but again, and on, to wit, the 3d day of October, 1910, and while the said plaintiff and its agents and representatives were in the actual possession of said Lotta patented claim and also of the Parish No. 2 lode mining claim, and engaged in work upon said claims, again enter in and upon said Lotta and Parish No. 2 lode mining claims at a point near the boundary of said Lotta [105] and Parish No. 2 mining claims, and undertook to build a dam across said creek and to divert the water therefrom, which undertaking was resisted by the representatives and agents of this plaintiff, and the said defendant company, through its agents, officers and representatives, thereupon caused the representatives and agents of this plaintiff who had been resisting the entry of said officers and agents of said defendant upon said Lotta and Parish No. 2 lode mining claims, to be arrested by the United States Marshal on John Doe warrants, which were issued on John Doe complaints

filed with the United States Commissioner, verified by an officer and representative of said defendant company, and while the agents and representatives of plaintiff were in the custody of the said United States Marshal, the said representatives, agents and employees of the said defendant company partially constructed their dam across Gold Creek sufficiently to make a pretended diversion of some water of Gold Creek into a short piece of timber flume, which had hastily been constructed by the employees of the said defendant company. That after said arrests were made and the work above resisted accomplished by the defendant company, the representatives and agents of this plaintiff returned to said Lotta and Parish No. 2 lode mining claims and proceeded with their said work, especially the running of a tunnel for the opening up of the Parish No. 2 mining claim at a point on the right hand of Gold Creek going up said creek at an altitude of about — feet above the bed of the creek on the hillside; that in running said tunnel the debris and much was dumped therefrom down said hillside into said Gold Creek, but all of such work and dumping was done upon said Parish No. 2 lode mining claim. That this plaintiff failing to obtain [106] a restraining order as above set forth, the said defendant continued its said work of building and constructing a timber flume in and over the said Parish No. 2 lode mining claim, and when they reached a point in the construction of their said flume on the hillside on the right bank of said Gold Creek just below the mouth of the tunnel that was

being run by this plaintiff as aforesaid, and where this plaintiff had been dumping, the said defendant did, by its officers and agents, again cause the representatives of this plaintiff, who were engaged in the work of running said tunnel and dumping as aforesaid, to be arrested in the same manner and form as the arrests first hereinbefore referred to, and while said representatives and agents of this plaintiff were in the custody of said United States Marshal, the said defendant, connected up its said timber flume and thus crossed the said Parish No. 2 lode mining claim. That the entry of said defendant in and upon and over the ground and mining claims of this plaintiff was at all times resisted by the plaintiff and the same was a wrongful and forcible entry and against the will and consent of said plaintiff, and the only possession that said defendant ever gained of any part or portion of said Parish No. 2 or the Lotta patented claim was made in a forcible manner as herein described, and this action is brought to oust said defendant from such possession.

WHEREFORE, this plaintiff prays for the relief demanded in the amended complaint herein.

WINN & BURTON,
Attorneys for Plaintiff."

That thereafter the plaintiff made a motion in open court and asked to dismiss the third cause of action in the Amended [107] Complaint, on the ground that the title to the Cape Horn mining claim, set up and described in said third cause of action, was in William M. Ebner and not in the Ebner Gold

Mining Company. Whereupon the Court made and entered the following Order, to wit:

*“In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

ORDER (DISMISSING THIRD CAUSE OF
ACTION OF AMENDED COMPLAINT
WITHOUT PREJUDICE).

Upon motion made by counsel for plaintiff in the above-entitled cause, in open court, in the presence of counsel representing the above-named defendant in said above-entitled cause, that the third cause of action set forth in the amended complaint herein be dismissed without prejudice, for the reason that upon an examination of the records of title it had been ascertained that the title to the Cape Horn Lode Mining Claim set up and described in said third cause of action in said amended complaint was in William M. Ebner and not in the Ebner Mining Company, the party plaintiff herein;

And the Court being fully advised in the premises, IT IS ORDERED that said third cause of action in said amended complaint herein be, and the same is hereby, dismissed without prejudice to the bring-

ing or commencement of another suit for the same cause or subject matter of said action.

Done in open court this 24th day of May, A. D. 1911.

EDWARD E. CUSHMAN,
Judge." [108]

That thereafter the defendant waived the defense of another action pending, as set up in the Answer, and the cause was duly and regularly set down for trial, and further that the Court made an order in relation to a request to amend the Answer, which said Order is in words and figures as follows:

*"In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

ORDER (ALLOWING INSERTION OF MAT-
TER ON PAGE 4 OF ANSWER).

This matter coming on on application of the defendant, the Court being fully advised, HEREBY ORDER that the following be inserted in the answer of the defendant herein on page 4, immediately following paragraph 2 of the defendant's answer to the second cause of action:

" '2d-b. And defendant further alleges as a

further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and benefit of said Parish No. 2 lode claim under or by virtue of said alleged locations of plaintiff, and that plaintiff and [109] his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendant as hereinafter set forth and have failed to record the affidavit of annual labor and improvements required by statute and thereby the plaintiff's claim, if any he had, became and was actually forfeited.' "

Done in open court this 9th day of June, 1911.

EDWARD E. CUSHMAN,
Judge."

That upon the issues so framed the cause went to trial and was duly and regularly tried before the Court. Whereupon the Court made and entered its Findings of Fact and Conclusions of Law, which are in words and figures as follows:

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

This cause having heretofore come on for hearing upon the issues made by the amended complaint, the amended and supplemental answer and the reply to said amended and supplemental answer, a jury having been by the respective parties expressly waived plaintiff having introduced all of its testimony and rested its case, and the defendant having introduced all of its testimony and rested its case; plaintiff having introduced its rebuttal testimony and defendant having introduced its sur-rebuttal testimony, [110] both parties having rested and argument of counsel representing the respective parties having been made, and the Court being fully advised in the premises, finds:

1. That the plaintiff, Ebner Gold Mining Company, is a corporation organized December 5, 1895, and existing under and by virtue of the laws of the United States provided for the District of Alaska;

and is authorized to do and has been engaged in and doing a general mining business in said district for over fifteen years. Said plaintiff corporation is entitled to hold, deal in and acquire title from the United States to mineral lands and been qualified so to do at all times mentioned in the amended complaint herein.

2. That the defendant is a corporation duly organized and doing business in the District of Alaska.

3. The Court further finds that the plaintiff is now and has been for several years last past seized in fee and possessed and entitled to the possession of that certain patented lode mining claim situated in the Harris Mining District, District of Alaska, namely, the Lotta lode mining claim, United States Mineral Survey No. 87, more particularly described as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. center end of claim; thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold and Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode Survey No. 238, patented; thence south $57^{\circ} 24'$ west [111] 150 feet to southeast center end of Lotta Lode, 300 feet to Corner No. 5, identical with Corner No. 5, Royal Lode, Survey No. 238, patented; thence east side doorway of old cabin, bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. center

end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

4. That while plaintiff was the owner of such mining claim and seized and possessed thereof, the defendant, early in August, 1910, without right or title, entered into possession of part of said Lotta mining claim and without right or title thereafter constructed thereon a portion of a certain dam, with structures accessory thereto, for the purpose of diverting the waters of Gold Creek flowing in, through and over said Lotta lode mining claim, and ousted and ejected plaintiff therefrom, and now wrongfully and unlawfully withholds the possession thereof from the plaintiff.

5. That the plaintiff is not and never has been seized, possessed or entitled to the possession of that certain tract of ground described in paragraph 3 of the plaintiff's second cause of action, set forth in the amended complaint herein, and known and referred to as the Parrish #2 lode mining claim. That the ground claimed by the plaintiff as the Parrish #2 lode mining claim was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore.

[112]

6. The Court further finds that no assessment work required by law to the extent of \$100 each year has been performed or caused to be performed

in labor and improvements of any kind or for the benefit and use of said Parrish #2 claim prior to the year 1909, and that the plaintiff and its grantors failed and neglected to sufficiently represent said claim during the years prior to 1909, after its attempted location in 1899.

The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parrish #2 lode mining claim for the years 1909 and 1910 and within the time in each of said years required by law, providing the same was a valid and subsisting mining claim, based upon a valid location.

7. The Court further finds that about the first day of August, 1910, while the waters of Gold Creek were flowing in their usual channel, L. D. Mulligan, acting as the agent and employee of the defendant, posted a notice upon the property in controversy, said notice reciting the location by him of 20,000 miner's inches of the unappropriated waters of Gold Creek.

That thereafter the defendant proceeded to erect part of a dam and construct a flume upon the public domain, which flume and a portion of said dam were on, over and across the property claimed by the plaintiff as the Parrish #2 lode mining claim, and that at the time of said location and erection of said dam and flume and the diversion and appropriation of said water, the said property so described as the Parrish #2 lode mining claim was a part of the unoccupied, unsegregated [113] public domain of the United States, and that said flume

extends across the said property indicated upon the map on file herein, known as Defendant's Exhibit #7, which for the purposes of description is made a part of this finding.

8. The Court finds that under the custom of miners which was and is generally observed by the miners of the Harris and surrounding mining districts, the Harris Mining District being the mining district in which all the property and property rights in controversy are situated, the appropriator of water has uniformly exercised the claimed right, without opposition, to build ditches and canals across unpatented mining claims owned and held by persons other than the appropriator, in order to convey water to the place of intended use, whether such water is diverted from the stream on the mining claim or such other or beyond the same.

9. The Court further finds that under the custom of miners, recognized by the miners of the district within which the property in controversy is situated, the riparian proprietor has no right to the use of the water of the running streams by reason of such riparian ownership as against a prior appropriator, and the Court further finds that under the customs of miners observed by the miners of the district in which the property in dispute is situated, rights to the use of the waters of running streams may be acquired by diversion, appropriation and application to beneficial use. That the defendant went upon the property in controversy to construct a dam and flume for the purpose of diverting and appropriating water for use in furnishing [114] power

in connection with the operation of a stamp-mill to be constructed by it and for other uses in connection with the operation of its mines in Silver Bow Basin, within the district drained by said Gold Creek.

10. The Court further finds that the Oregon mining claim referred to in defendant's answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore.

11. The Court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect.

And the Court concludes as a matter of Law:

1. That the plaintiff is entitled to the possession of the Lotta mining claim and is the owner thereof as staked upon the ground and described in plaintiff's amended complaint, and is entitled to a decree ousting the defendant therefrom.

2. That the plaintiff is entitled to a writ of restitution and a writ of ejectment herein restoring the plaintiff to the possession of the Lotta patented claim as more particularly set out in the Findings

of Fact herein, said writ of [115] ejectment to eject the defendant, its officers, agents and employees from said premises and each and every portion thereof.

3. That the location known as the Parrish #2 lode mining claim is void and of no effect.

4. That the locations known as the Oregon lode mining claim, located by R. G. Datson, and the Oregon lode mining claim, located by J. P. Corbus, and the Canyon lode mining claim, located by W. R. Lindsay, are void and of no effect.

5. The Court further concludes that neither of the parties is entitled to recover costs in this suit.

Done in open court this 5th day of July, 1911,
nunc pro tunc as of June 12, 1911.

EDWARD E. CUSHMAN,
Judge."

And thereafter on the 5th day of July, 1911, the Court duly made and entered its final decree in said cause, which is in words and figures as follows:

*"In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

JUDGMENT AND DECREE.

This matter having come on for trial, plaintiff being represented by Messrs. Winn & Burton, the defendant by Messrs. [116] Hellenthal & Hellenthal and Messrs. Shackleford & Bayless; evidence having been already taken, arguments heard and the cause submitted, and the Court having made its Findings of Fact and Conclusions of Law, and being fully advised in the premises:

IT IS ORDERED, ADJUDGED, CONSIDERED AND DECREED that the plaintiff have and recover of and from the defendant the possession of that certain lode mining claim known as the Lotta mining claim, United States Survey No. 87, and that the defendant be ejected from the possession of said mining claim, or so much of the same as it is in possession of, which said lode mining claim is particularly described as staked upon the ground and more particularly as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented) a post at the N. W. center end of claim; thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast center end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of old cabin bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north

31° 36' west 1500 feet Corner No. 6; thence north 57° 24' east 150 feet to NW. center end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

It is further CONSIDERED, ORDERED, ADJUDGED AND DECREED that [117] the plaintiff take nothing further by his complaint herein, and except as to the Lotta lode mining claim this cause and action be dismissed, without cost to either side.

The Court further retains and reserved jurisdiction in this cause for the purpose of supplementing, if the same hereafter appear necessary, this judgment with a fuller and more accurate description of the property referred to therein, and for the further purpose to determine to what exact extent the structures of the defendant are within the limits of the said Lotta lode mining claim therein referred to.

Done in open court this 5th day of July, 1911,
nunc pro tunc as of June 12, 1911.

EDWARD E. CUSHMAN,

Judge."

That thereafter said cause was by the Ebner Gold Mining Company taken to the Circuit Court of Appeals for the Ninth Circuit on Writ of Error, whereupon, hearing duly had, the following Mandate was handed down:

Mandate of U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA,—ss.

To the Honorable the Judges of the District Court
of the United States for the District of Alaska,
Division No. 1, Greeting:

Whereas, lately in the District Court of the United States for the District of Alaska, Division No. 1, before you, or some of you, in a cause between Ebner Gold Mining Company, a Corporation, Plaintiff, and Alaska-Juneau Gold Mining Company, a Corporation, Defendant, No. 835-A, a Judgment and Decree was [118] duly filed on the 21st day of August, A. D. 1911, ordering, adjudging, considering and decreeing that the plaintiff have and recover of and from the defendant the possession of that certain lode mining claim known as the Lotta Mining claim, United States Survey No. 87, and that the defendant be ejected from the possession of said mining claim, or so much of the same as it is in possession of, etc.; which said Judgment and Decree is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by Ebner Gold Mining Company, a Corporation, as Plaintiff in Error against Alaska-Juneau Gold Mining Company, a Corporation, as Defendant in Error, agree-

ably to the Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the 6th day of May, in the year of our Lord one thousand nine hundred and thirteen the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the plaintiff in error and against the defendant in error, and the court below is directed to amend the judgment heretofore made by it by striking out the words "without cost [119] to either side," and substituting therefor words which will award costs to the plaintiff, and as thus amended the judgment shall stand affirmed.

It is further ordered and adjudged by this Court that the plaintiff in error recover against the defendant in error for its costs herein expended, and have execution therefor.

(January 5, 1914.)

YOU, THEREFORE, ARE HEREBY COMMANDED that such amendment, execution and further proceedings be had in the said cause in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said Judgment and Decree of said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 13th day of February, in the year of our Lord one thousand nine hundred and fourteen.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of costs allowed and taxed in favor of the plaintiff in error and against the defendant in error as per Annexed Bill of Items, taxed \$3,358.05.

F. D. MONCKTON,
Clerk."

That thereafter and on the 17th day of March, A. D. 1914, the following Judgment was entered in the District Court for the District of Alaska upon the Mandate so handed down by the Circuit Court of Appeals: [120]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant.

Amended Judgment and Decree.

WHEREAS, a judgment was rendered by the above-entitled court in the above-entitled cause on

the 5th day of July, 1911, and filed and entered with the clerk of this court on the 21st day of August, 1911, without costs to either side, and

WHEREAS, a writ of error was sued out to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, and said cause removed to said court and after a hearing had thereon, the said Appellate Court filed its opinion in said cause in said court and issued a mandate out of said cause on the thirteenth day of February, A. D. 1914, which said mandate is on file in this court and has been spread upon the records by the clerk of this court, and orders and directs this court to amend the judgment and decree heretofore entered in this cause by striking out the words "without costs to either side" and by inserting therein such word or words or phrases as will award costs in this court to the above-named plaintiff;

And this matter coming on for hearing on motion of the above-named plaintiff to have said judgment so amended, [121] modified and changed, and the Court being fully advised in the premises, and after examining said mandate, the judgment heretofore rendered in this court on the 5th day of July, A. D. 1911, and filed with the clerk of this court on the 21st day of August, 1911, is amended, modified and changed so as to read as follows:

JUDGMENT AND DECREE.

"This matter having come on for trial, plaintiff being represented by Messrs. Winn & Burton, the defendant by Messrs. Hellenthal & Hellenthal and Messrs. Shackleford & Bayless; evidence having

been already taken, arguments heard and the cause submitted, and the Court having made its Findings of Fact and Conclusions of Law, and being fully advised in the premises:

It is ORDERED, ADJUDGED, CONSIDERED AND DECREED, that the plaintiff have and recover of and from the defendant the possession of that certain lode mining claim known as the Lotta mining claim, United States Survey No. 87, and that the defendant be ejected from the possession of said mining claim, or so much of the same as it is in possession of, which said lode mining claim is particularly described as staked upon the ground and more particularly as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. center end of claim; thence north $57^{\circ} 24'$ east; 50 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. [122] 3, identical with Corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast center end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of old cabin bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. center end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

It is further CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing further by his complaint herein and except as to the Lotta lode mining claim this cause and action be dismissed *and plaintiff recover of and from the defendant its costs and disbursements herein to be taxed by the clerk of this court and that execution issue therefor.*

The Court further retains and reserves jurisdiction in this cause for the purpose of supplementing, if the same hereafter appear necessary, this judgment with a fuller and more accurate description of the property referred to therein, and for the further purpose to determine to what exact extent the structures of the defendant are within the limits of the said Lotta Lode Mining claim therein referred to.

AND IT FURTHER APPEARING from the mandate of the [123] United States Circuit Court of Appeals on file in this Court and herein referred to that the costs of said proceedings in said Appellate Court were and are taxed in favor of the plaintiff and against the defendant herein in the sum of \$3,358.05;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of and from the defendant herein the sum of \$3,358.05, being the amount of costs set forth in said mandate and the further sum of \$603.55 to be taxed by the clerk of this court, making a total sum of \$3,961.60 and that execution issue for the whole of said amount.

DONE IN OPEN COURT THIS 17th day of March, A. D. 1914.

ROBERT W. JENNINGS,
Judge."

And said cause was thus finally determined and adjudicated and the final judgment rendered therein as above stated is still in full force and effect.

VI.

The plaintiff further replying to the allegations of the answer of the defendant, alleges:

That at the time it caused its notice of appropriation of water to be posted on the banks of Gold Creek by L. D. Mulligan, to wit, on the 1st day of August, 1910, as stated in its complaint, it had no knowledge of the existence of any such notice as the notice referred to in the Answer as having been posted by H. T. Tripp on June 20, 1910, nor did it have any knowledge or information that would lead it to believe that any such notice had ever been posted, or ever had any existence, [124]

That said notice was not then recorded in the office of the recorder for the Juneau Recording District, the same being the district in which Gold Creek is situate, so that the plaintiff had no constructive notice of the fact that such notice had been posted, if it ever had been posted; that the defendant, The Alaska-Ebner Gold Mining Company was on the said first day of August, and for some time prior thereto had been, the owner of a group of lode mining claims situate along the banks of Gold Creek, which mining operations had been carried on on a small scale during previous years; that in this connection

a twenty-stamp mill had been constructed on the property and the waters of Gold Creek diverted and applied to use in connection with its operations, but the waters so diverted and applied were turned back into Gold Creek at a point a considerable distance above the plaintiff's present dam and intake, and the point where plaintiff's notice signed by L. D. Mulligan, as referred to in the complaint, was posted; that such operations had been for some time suspended and the property allowed to remain idle; that prior to August 1, 1910, however, steps had been taken by the said Ebner Gold Mining Company looking towards the operation of the property on a larger scale and in that connection a site for a new and enlarged mill was chosen by the said company, which said site was situate on the Lotta mining claim a considerable distance above the point where the plaintiff's dam was afterwards constructed and above the point where the notice of the said L. D. Mulligan was posted as stated in the complaint; that upon this site the said Ebner Gold Mining Company erected a [125] building in which to install and house the machinery and stamps necessary in order to complete its said contemplated larger mill, and made an excavation for use in connection with the still further enlargement of its said new mill, and a flume was built along the hillside from the Ebner dam to a point above the site where said mill building was so constructed. In addition to actually doing said work of construction as above indicated, the said Ebner Gold Mining Company acquainted the plaintiff company with its said plans for enlarged

mill construction; that if the waters of Gold Creek were applied and used in connection with the operation of a mill situate on the said Lotta claim, at or near the vicinity where the building for said larger mill was actually constructed, the same would be turned back into Gold Creek and allowed to flow in the natural channel of the creek a considerable distance above the point where the plaintiff's dam and intake was afterwards constructed and above the point where the notice of the said L. D. Mulligan was posted on August 1, 1910, as indicated in the complaint; that on the first day of August, 1910, and for a long time thereafter, the plaintiff had no knowledge or information that the said Ebner Gold Mining Company, or any other of the defendants herein, contemplated the construction or erection of a milling plant at any point other than the point on the Lotta Mining Claim above last referred to, where the work in connection with the construction of such plant had already been carried on, and the plaintiff then and for a long time thereafter believed that it was the intention of the said Ebner Gold Mining Company to erect a new and enlarged [126] mill on the point on the Lotta Mining Claim above referred to and to apply the waters of Gold Creek in connection with its operations and return the same to the stream before reaching the point where it was the intention of the plaintiff to divert the water, that is to say, the point immediately below the lower or most southerly line of the Lotta lode claim, where the plaintiff's dam was afterwards constructed. That the plaintiff relying upon the representations

so held out by the defendants, and on the first day of August, 1910, while said new mill building, said excavation and said flume line leading thereto were the only evidences by which the plaintiff could be guided in determining where it was the intention of the defendants to apply the waters of Gold Creek and while no work in connection with mill construction at any other point and when there were no indications that the defendants ever intended to convey the waters of Gold Creek to a point below the plaintiff's present intake, the plaintiff went upon the ground and located and appropriated its water right as alleged in the complaint and spent large sums of money in that connection. That the defendants' conduct in this regard was not only such as to preclude it, or either of them, from acquiring a water right in Gold Creek as against this plaintiff, but was such as to estop them and each of them from claiming the right to the use of such water as against this plaintiff.

In this connection the plaintiff further avers that neither the defendant, the Ebner Gold Mining Company, nor any of the other defendants, had on the said first day of August, 1910, nor for many days thereafter, decided to or formed any intention of constructing a milling plant at the point near [127] Shady Bend where the work of excavation referred to in the Answer was afterwards carried on. And further that none of the defendants herein, except the Ebner Gold Mining Company, owned any interest in any mining claims or other real property situate in the Harris Mining District, or anywhere in the

vicinity of the Territory through which Gold Creek flows, on the first day of August, 1910, or for a long time thereafter. That on the said first day of August, 1910, the Ebner Gold Mining Company was the owner of a group of mining claims generally known and referred to as "The Ebner Group"; that the most southerly claim belonging to said group and the claim furthestest down Gold Creek is and was the Lotta claim and the lower or southerly side line of said Lotta claim *form* the lowermost boundary of said group. The Ebner Gold Mining Company did not on the 20th day of June, 1910, the first of August, 1910, or at any other time or times referred to in the pleadings in this case, own or possess any mining claim, or other right or interest in property to the south of the said lower side line of the Lotta claim or further down the creek than the line marked by said lower side line of said Lotta claim, the ground upon which the excavations were afterwards made as alleged in the answer, with the alleged view of erecting a milling plant, being not then or at any other time herein mentioned the property of the Ebner Gold Mining Company. That the said site referred to in the Answer as the site for a new milling plant is so wholly unsuited for the purpose indicated, due to its situation immediately below a mountainside so situated that slides, which would demolish any structure placed thereon, may be expected at any time, that no one would be led to the belief that this site would be chosen as a [128] site for a milling plant.

In this connection it is averred that the plaintiff

does not believe it to be the intention of the defendants, or any of them, to erect a milling plant at this point, but believes that said site was selected solely because so situate that a large showing in the way of grading could be here made at comparatively little expense so as to facilitate the sale of stock. And in this connection it is further averred that no work looking either towards the grading of a site or the construction of a milling plant was carried on at this point by the defendants or any of them until long after the plaintiff had commenced work looking towards the appropriation of the waters of Gold Creek as averred in the complaint. And further, that no work of any character looking towards the appropriation of the waters of Gold Creek by the defendants, or any of them, for use at a point lower down the creek than the plaintiff's dam, was commenced or performed until long after the work done by the plaintiff looking towards the appropriation of the water was commenced as averred in the complaint.

For the several reasons herein stated, the notice posted by H. T. Tripp, as alleged in the answer, if the same was posted, a proceeding which the plaintiff had no knowledge or information of on the first of August, 1910, or for a long time thereafter, either actual or constructive, would not have apprised the plaintiff of any intention on the part of the defendants, or either or any of them, to convey the waters of Gold Creek and [129] apply the same to use at any point below the plaintiff's intake, and could not, even though the plaintiff had had knowledge

thereof, serve as a notice of any such intention.

WHEREFORE the plaintiff prays that the defendants, take nothing by reason of the matters set up in the Answer, and for judgment as in the complaint prayed for.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff. [130]

United States of America,
Territory of Alaska,—ss.

Robt. A. Kinzie, being first duly sworn, on oath, say: That I am the general superintendent of the Alaska-Juneau Gold Mining Company plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof and believe the same to be true.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 6th day of June, A. D. 1914.

[Notarial Seal] GUY McNAUGHTON,
Notary Public for Alaska.

My commission expires Oct. 24, 1916.

Filed in the District Court, District of Alaska,
First Division. Jun. 8, 1914. J. W. Bell, Clerk.
By —————, Deputy.

[Endorsed]: Original No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. Alaska Ebner Gold Mining Company, a Corporation et al., Defendant. Reply. Hellenenthal & Hellenenthal, Attorneys for Plaintiff. Office: Juneau, Alaska. [131]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1074-A.

THE ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, THE ALASKA EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA
EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

Motion for Leave to Amend Reply.

Comes now the plaintiff and asks leave of Court to amend the Reply herein by interlineation, by adding after the word "effect," appearing on the fifth page at the close of the third allegation, the following:

"That all the things required by the above rules, in connection with the appropriation of water, are also required by the customs of the miners of the Harris Mining District, and under said customs a forfeiture results whenever any of such requirements are not complied with."

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy.

[Endorsed]: Original No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. The Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. The Ebner Gold Mining Company, a Corporation, The Alaska Ebner Gold Mines Company, a Corporation, Angus Mackey, as Receiver for the Alaska Ebner Gold Mines Company, and Downie D. Muir, Defendant. Motion. Hellenthal & Hellenthal, Attorneys for Plaintiff. Office, Juneau, Alaska. [132]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1074-A.

THE ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKEY, as Receiver for the ALASKA EBNER GOLD MINES COMPANY and DOWNIE D. MUIR,

Defendants.

Order Granting Leave to Amend Reply.

This motion coming on to be heard on the motion of the plaintiff to amend the Reply by interlineation,

and the Court being fully advised in the premises, Orders that the permission to so amend the reply be granted, and the plaintiff is hereby permitted to interline the Reply by adding thereto after the word "effect," at the close of the third allegation on the fifth page, the following words:

"That all the things required by the above rules, in connection with the appropriation of water, are also required by the customs of the miners of the Harris Mining District, and under said customs a forfeiture results whenever any of such requirements are not complied with."

Defendant excepts and exception allowed.

ROBERT W. JENNINGS,
District Judge.

Entered Court Journal No. J, page 520.

Filed in the District Court, District of Alaska, First Division. Jul. 13, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy.

[Endorsed]: Original No. 1074-A. In the District Court for the Territory of Alaska, Division No. 1. The Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. The Ebner Gold Mining Company, a Corporation, The Alaska Ebner Gold Mines Company, a Corporation, Angus Mackey, as Receiver for the Alaska Gold Mines Company and Downie D. Muir, Defendant. Order. Hellenthal & Hellenthal, Attorneys for Plaintiff. Office: Juneau, Alaska. [133]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1074—A.

THE ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, THE ALASKA EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA
EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

Motion to Amend Reply.

Comes now the plaintiff and asks leave of Court to amend its Reply by substituting in the place of that portion of the Reply commencing on page eight (8) at the beginning of the paragraph occurring near the center of said page and beginning with the words "Referring to paragraph ten" up to and including the second paragraph occurring on page nine (9) of said Reply and immediately preceding the words, "In this connection the Plaintiff avers," the following:

Referring especially to the allegations of paragraph ten (10) in the defendant's answer, the plaintiff denies that either it or the said L. D. Mulligan went upon the Lotta mining claim as a malicious or wilful or naked trespasser, or at all except as here-

inafter stated. And in this connection and in order to establish its good faith in the premises, the plaintiff avers:

That the point at which the said L. D. Mulligan posted the notice of water appropriation, as alleged in the complaint, is situate in wild and unoccupied territory; that the lower or southerly side line of the Lotta lode mining claim was not at the time the notice was so posted established or declared by a judicial decision or otherwise; that if said Lotta claim were surveyed and located upon the ground in accordance with [134] the field-notes contained in the patent thereof, starting from known and well established points in the vicinity, or by tying said claim to Gold Creek in the manner indicated in the patent of said claim, said tie being the only tie or call to natural objects given in the patent, the point where the notice was posted by the said Mulligan would be below and to the south of the lower side line of the Lotta claim and not on said claim.

In this connection the plaintiff further avers: That it was claimed that there were at that time upon the ground certain stakes intended to mark at least some of the corners of the Lotta mining claim upon the ground, but that the plaintiff was entirely without any knowledge concerning either the claim so made or the existence of such stakes, and that the only available means by which plaintiff could determine the location of the Lotta claim upon the ground *consist* in the field-notes given in the patent and such known, established and familiar objects as the corners of plaintiff's claims and other like points; that

the plaintiff consulted all the available data and used all the means at hand with a view of determining the southerly side line of the Lotta, and in so doing reached the conclusion in good faith that the same was situate upon the ground to the north of and above the point where the said notice of the said Mulligan was posted, so that the said last-mentioned point would not fall or be upon the Lotta claim; that the plaintiff thereupon with *bona fide* and honest intention of posting said notice to the south of and below the boundary of the said Lotta claim caused the same to be posted at the point where the same was posted by L. D. Mulligan; that shortly thereafter, its attention was directed to the fact that the Ebner Gold Mining Company, one of the defendants herein, claimed the southerly side line of the Lotta to be further to [135] the south, so that the said Mulligan notice as posted would fall upon the Lotta claim; that immediately upon being so advised the plaintiff formed the intention of diverting the water at the point below the line so claimed by the said Ebner Gold Mining Company as the southerly line of the Lotta claim, and afterward built its dam and intake at a point below the line so claimed as the southerly side line of the Lotta Claim by the said Ebner Gold Mining Company; that the southerly line of the Lotta lode mining claim was, after the notice was posted and after the plaintiff had built its dam and intake at the point where the same is now situate, declared and adjudicated to be marked by the stakes upon the ground above referred to, so that the point where the said Mulligan notice

was posted was determined to be upon the Lotta claim. The dam and intake of the plaintiff constructed upon the ground, however, was to the south of and below the southerly boundary of the Lotta claim as so established and not upon the said Lotta claim.”

And in this connection, the plaintiff asks that such amendment be made by interlineation or pasting over that portion of the Reply that is being amended, the averments above referred to.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed *ibe* District Court, District of Alaska, First Division. Jul. 17, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy.

[Endorsed]: Original No. 1074-A. In the District Court for the Territory of Alaska. Division No. 1. Alaska Juneau Gold Mining Co., Plaintiff, vs. The Ebner Gold Mining Co., et al., Defendant. Motion. Hellenthal & Hellenthal, Attorneys for Plaintiff. Office: Juneau, Alaska. [136]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1074-A.

THE ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, et al.

Order Allowing Plaintiff to Amend Reply, etc.

Upon consent of J. R. Winn, Esquire, of counsel for defendants, given in open court, J. A. Hellenthal, Esquire, of counsel for plaintiff, is allowed to amend the reply herein by interlineation or substitution of a page or pages, with leave to defendants' attorneys to move against the reply when so amended.

Done in open court, this 20th day of July, 1914.

(Entered Journal J, page 529.)

ROBERT W. JENNINGS,
District Judge. [137]

*In the United States District Court, for the District
of Alaska, Division No. One.*

No. 1074-A.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

EBNER GOLD MINING COMPANY et al.,
Defendants.

Opinion.

JENNINGS, Judge:

Defendants claim that some sort of superior equity or right by relation to June 20, 1910, enures to them by reason of the rules of the old Harris Mining District and of the fact that on that date H. T. Tripp posted a notice claiming 10,000 inches of the water of Gold Creek.

There is no statute in Alaska *requiring* notices of

the location of water rights to be posted or recorded, although there is a statute *allowing* them to be recorded, but that statute says nothing as to the effect of a notice when posted or recorded.

Defendants maintain, however, that the customs and rules of the old Harris Mining District are in evidence and that the Court should take them into consideration and allow defendant's water right to date from that notice—conceding that the Court should take said customs and rules into consideration, [138] and proceeding so to do, it appears that Articles 6, 7, 8, 9 and 10 of said rules provides as follows:

“Art. 6. A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein: First, he claims the water there flowing to the extent of (giving the number) inches, measured under a six-inch pressure; second, the purpose for which he claims it, and the place of intended use. A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the district.”

“Art. 7. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.”

“Art. 8. By completion is meant conducting the waters to the place of intended use.”

“Art. 9. By a compliance with the above rules the claimant’s right to the use of the water relates back to the time the notice was posted.”

“Art. 10. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.”

It is apparent, by casual inspection of the Tripp notice that it fails to measure up to the requirements of Article VI—not only that but the evidence shows that during the twenty days after the notice was posted the claimant (or his grantees) did not “commence the excavation or construction of the works in which he intends to divert the water” as provided in Article VII—Article VII therefore was not complied with. As Article 6 and 7 were not complied with, defendants gain no priority by relation by reason of the Harris Mining District rules, for it is “By a compliance with the above rules the claimant’s right to the use of the water relates back to the time the notice was posted.”

Plaintiffs claim to have posted a notice on August 1, 1910—the Mulligan notice; even if they did, that notice [139] is as defective as the Tripp notice—Neither notice contains a statement of “the place of intended use.”

On the 17th of August, 1910, defendants posted and recorded another notice. This notice I leave out of consideration, because prior to that time plaintiffs had actually commenced work.

On the 8th day of May, 1911, plaintiffs posted another notice—This notice I leave out of consideration, because prior to that date defendants were openly prosecuting work on their flume.

Thus, so far as relation back by virtue of Harris District Mining Rules is concerned, there is left out of consideration all the posted notices which have appeared in the evidence.

No case has been cited, and I apprehend that none can be found, where a water right in the absence of compliance with a statute or with local rules or customs, relates back to a written notice as a notice, pure and simple, securing to the poster of such notice rights which he would not have unless he had taken steps equivalent to a written notice. Notwithstanding that, it does not follow that if a notice be posted, even in those states where there is no Statute or local custom or rule, the notice is of no effect whatsoever. Even in such cases the notice may have a very important effect, as evidence of the intention of the party posting it. This intention of the party is one of the vital elements that go to make up a valid appropriation of water. [140]

In the case of *McFarland vs. Perseverance Company* it is said by Judge Wickersham:

“To constitute a valid appropriation of water, three elements must always exist.

(1) An intent to apply it to some beneficial use existing at the time or contemplated in the future.

(2) The diversion from the natural channel by means of ditch, canal or other structure.

(3) The application of it, within a reasonable time, to some useful industry.”

And he cites in support thereof

Nevada Ditch Co. vs. Bennett, 30 Ore. 59;

Lowe vs. Rizor, 25 Ore. 557.

And, in 3 Alaska, 572, Miocene Ditch Co. vs. Cam-pion Mining Company, those three elements are again mentioned as being essentials to constitute a valid ap-propriation of water.

I think the statement of the essentiality of those three requirements may be considered as borne out by the authorities.

Now, the part that the notice would play under such circumstances, in jurisdiction where there is no Statute nor local rules, is this: It would go to estab-lish the first essential, to wit, intent—it would be evi-dence of the intent.

Miocene Ditch Co. vs. Mining Co., 3 Alaska,
582;

Weil, Section 380.

“ “ 376.

Not only does the notice have the effect of furnish-ing evidence of the intent of the persons posting the notice, but it also serves this purpose: It gives warn-ing to others that somebody has got the intention of utilizing that water; in other words, it serves as a warning.

Weil, Section 374.

So that the part which the Tripp and Mulligan no-tice play in establishing whether or not the parties have a water right is that they may be taken as evi-dence of intent. [141]

So far as intent is concerned, I can attach no importance to the testimony that as long ago as ten years previous to August 1, 1910, the plaintiffs had determined that they would some day build a mill on the shores of Gastineau Channel and would immediately need and use the waters of Gold Creek—and that that was the best way to work the ore bodies belonging to plaintiffs—Plaintiff may have thought so—may have determined some day to carry out that plan. It is sufficient to say that if such was their plan and determination, for ten long years they kept all knowledge of it securely locked in their own breasts—neither stating it publicly, nor taking any outward visible steps to harness the waters of Gold Creek for the execution of their ultimate plan—They must have known during all those years that the waters of Gold Creek were liable to be appropriated by others to the full extent of the flow. Neither can I attach any importance to the testimony that prior to August 1st plaintiffs had secured a large number of claims over which they intended to lay out a flume line. It was not necessary that a person should actually own the land over which he wishes to lay a flume to convey water; and ground is taken up as a mining claim on the theory presumptively and primarily that, a discovery of gold having been made, it will justify the expenditure of time and money in further exploitation. So that I cannot see that the intent on the part of plaintiffs was manifested at an earlier date than the date of the Mulligan notice—August 1, 1910. But defendants had manifested intent by the Tripp notice of June 20, 1910. Thus it

appears that the defendants were prior in point of time in manifesting their intent. Defendants thus took the first step in notifying [142] the world of the intent to appropriate—they took the first step to warn others to keep off. They were what is called the first comers.

But intent alone is not sufficient, it must be followed by diligence to appropriate and intent and appropriation are not sufficient—that must in turn be followed by beneficial use.

In view of the fact that there is no Statute, and that neither side complied with any rules (at least until the rules had lost their efficacy, (if any they ever had) by reason of the fact that before such compliance the adversary had actually begun work), how have not the defendants the prior right if they manifested intent—first posted notice—first claimed—were first comers, and proceeded with diligence to appropriate and then with diligence to apply to a beneficial use? I think the manifesting of such intent is usually the first step to locate a mine or appropriate water, in a mining country.

The notice is a palpable and unequivocal outward sign of the intent to appropriate. In *Kimball vs. Gearhart*, 12 Cal., at page 49, the Court say:

“Thus is put in issue the very question of title, and this involves necessarily the due prosecution of the work after the appropriation, or, in other words, after the indication by some palpable and unequivocal outward sign of the intent to appropriate. The title to the water does not arise, as we have intimated before, from the manifesta-

tion of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title."

and on page 316:

"The right to the water does not *yet exist*, and *it may never vest*. The most that is *in esse*, is, a right to acquire, by reasonable diligence, a future right to the water." [143]

This case does not seem to depend upon any Statute or specially invoked rule. It is the law of appropriation. It is true that law was based on Miner's Rules, but those rules and customs in that regard were and are so well known that they are what might be termed the Common Law of Waters. They were the outgrowth of usage and are the foundation of the law of mines and of waters on the public domain.

First adopted in California, that usage and custom has spread to all the Western States. It had spread to this northern country.

That is the law of Alaska, irrespective of the rules of the Harris Mining District.

McFarland vs. Perseverance, 3 Alaska, 336.

If, after posting notice, work to appropriate be conducted with diligence and the application to a beneficial use be conducted with diligence, the ultimate actual appropriation will relate back to the notice—not because it is a piece of paper tacked to a stump—not because some Statute or special rule so provides, but because it is the first step to appropriate and the actual appropriation will relate back to the first step.

Ophir Silver Mining Co. vs. Carpenter, 4 Nev.
936;

Kimball vs. Gearhart, 12 Cal. 27;

Canal Co. vs. Kidd, 37 Cal. 282;

McKinny vs. Smith, 21 Cal. 381;

Osgood vs. Eldorado Water Co., 56 Cal. 578;

Sieber vs. Frink, 2 Pa. R. 901.

It is true that the statutes in many states expressly provide that the *first step* is the posting and recording of a notice. Such statutes are but a crystallization of miners' rules. The fact recognizes that the posting of notice is a step. It was a step before any Statute was enacted—if [144] it preceded any other step then it was the first step.

I find that the Tripp notice was the first step taken by anyone.

A little after one month from taking this first step arrangements were made with surveyors and early in August the flume line was surveyed and work on the flume begun, and I am unable to find any lack of diligence in prosecuting the work of appropriating the water and of applying it to a beneficial use.

It seems to me, then, that the evidence on this application does not show the right of plaintiff to be clear or probable. A fuller hearing may lead to the opposite conclusion. If the parties will get the case to issue I will try same at the earliest possible moment.

The application for an injunction *pendente lite* is denied.

Filed in the District Court, District of Alaska,
First Division. Feb. 3, 1914. J. W. Bell, Clerk.
By H. Malone, Deputy. [145]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1074—A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

EBNER GOLD MINES COMPANY, a Corporation,
Defendant.

Memorandum Decision.

I arrived at a conclusion in this case some time ago and have been hoping against hope to find time to write an opinion, but despairing of that I have decided to announce my decision orally.

The evidence on final hearing is not substantially different from that on the hearing for the preliminary injunction.

I am of the opinion that the rules of the Harris Mining District are obsolete and have never been in force in this District—at least not since the coming of organized government. I think the Tripp notice was the first step taken by anyone, and that those who took that step and their successors have proceeded with due diligence, and that they are prior in point of time to the plaintiff, and so finding, a decree will be entered dismissing the bill.

Filed in the District Court, District of Alaska,
First Division. Apr. 30, 1915. J. W. Bell, Clerk.
By John T. Reed, Deputy.

[Endorsed]: No. 1074-A. In the United States District Court for the District of Alaska Division No. One Alaska-Juneau Gold Mining Co., a Corporation, Plaintiff, vs. Ebner Gold Mines Co., a Corporation, Defendant. Memorandum Decision. [146]

In the District Court for the District of Alaska, Division No. One, at Juneau.

1074-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

EBNER GOLD MINES COMPANY, a Corporation,
Defendants.

Proceedings Had June 22, 1914.

BE IT REMEMBERED that this cause came on regularly for trial on the 22d day of June, 1914, before the Honorable ROBERT W. JENNINGS, Judge of the District Court for the District of Alaska, Division No. 1, holden at Juneau; that the plaintiff appeared by its counsel, Hellenthal and Hellenthal; defendants, and each of them, appeared by their counsel, Winn and Burton.

Whereupon the following proceedings were had:
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The plaintiff, to maintain the issues on its part, called as a witness

Testimony of R. G. Wayland for Plaintiff.

R. G. WAYLAND, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is R. G. Wayland? A. Yes, sir.

Q. What is your business calling or profession, Mr. Wayland? A. Surveyor and mining engineer.

Q. By whom, are you employed at present?

A. Alaska Treadwell Gold Mining Company.

Q. Also are the head surveyor for the Alaska Juneau Company? A. Yes, sir.

Q. And the other companies operated under the same management? A. Other allied companies.

Q. Are you familiar with the properties of the Alaska Juneau Gold Mining Company? A. I am.

Q. And with the properties of the Ebner Gold Mining Company? A. I am.

Q. You have in your possession data relating to those properties— A. Yes.

Q. And surveys and boundaries thereof, and the ownership of the claims? A. Yes.

Q. I call your attention now to a plant or map marked for identification Plaintiff's Exhibit No. 1, and ask you to look at *to* and state whether that was made under your directions? [151*—1†]

*Page-number appearing at foot of page of original certified Record.

†Original page-number of Testimony as same appears in Original Certified Transcript of Record.

(Testimony of R. G. Wayland.)

A. It was.

Q. Are all of the matters and things delineated upon that map correctly shown?

A. They are.

Q. And the boundaries of the properties belonging to the Alaska Juneau Gold Mining Company are correctly shown? A. They are.

Q. As well as those belonging to the Ebner Gold Mining Company? A. Yes, sir.

Q. And the other various matters and things are also correct?

A. The map is correct, to the best of my knowledge.

Q. Including the legends upon it? A. Yes.

Mr. HELLENTHAL.—I think that is all.

Cross-examination.

(By Judge WINN.)

Q. Mr. Wayland, how long have you been in the employ of the Treadwell Company?

A. About 8 years.

The COURT.—Just a moment—do you offer the map, Mr. Hellenthal?

Mr. HELLENTHAL.—I offer the map.

The COURT.—Any objection?

Judge WINN.—My objections will be better shown after I examine him. I object to it as not sufficient foundation has been laid for the introduction of the map, and it is immaterial and incompetent as proving any of the issues in this case.

The COURT.—You had better examine him and make your objections afterward.

(Testimony of R. G. Wayland.)

(Questions by Judge WINN.)

Q. Now, have you been doing very much surveying for the Alaska Juneau Company during this year? A. Somewhat; yes. [152—2]

Q. To what extent?

A. A little bit each year for the last four or five years.

Q. Have you surveyed any of the claims of the Alaska Juneau Gold Mining Company that are included within the exterior boundary lines of this plat, for patent, during your service with the Treadwell Company? A. No.

Q. You have not surveyed even one claim for the Alaska Juneau Gold Mining Company for patent that is included within these exterior boundary lines here that you have indicated as belonging to the Alaska Juneau Gold Mining Company?

A. No; I am not a deputy mineral surveyor.

Q. To what extent, then, Mr. Wayland, have you surveyed this property that is included in this map that has just been identified by you?

A. Every claim except the old patented claims have been surveyed under my direction, and the notes have been worked out in my office, and I have run a great many lines for tunnel and other improvements, tying various points in the improvements, and have checked whatever work came into the office.

Q. Don't you know that in these exterior boundary lines you have included some properties on the east side of the map that belong to the Alaska Gastineau people?

(Testimony of R. G. Wayland.)

A. I presume there may be conflicts.

Q. You know that to be true, don't you?

A. I know there are conflicts.

Q. But wherever there is a conflict, of course, you have given the Alaska Juneau Company the benefit of this conflict?

A. Everything that is included in that map is included in the exterior boundaries of claims claimed by the Alaska Juneau Company. [153—3]

Q. It is all Alaska Juneau over here on the west side where it is marked "Property of the Alaska Juneau Company," with the word, "Ebner Dam," just opposite it—don't you know there is property included in there that is owned by the Ebner Gold Mining Company?

A. I know there is a conflict.

Q. What do you mean by a conflict?

A. A conflict is a portion that is overlapped by another claim.

Q. Don't you know that where you have put this flume is patented property belonging to the Humboldt Company and there is no conflict pending over that property?

A. There is over a part of it.

Q. You know the Humboldt mill site, don't you?

A. Yes.

Q. And you have included that as the property belonging to the Alaska Juneau Company?

A. Part of it is and part of it is not.

Q. Part of the Humboldt is not patented?

A. It is not included in that area.

(Testimony of R. G. Wayland.)

Q. But the portion you have included you know is patented property, don't you?

A. Not all of it is patented property.

Q. Now, I will ask you this question: Do you know whether or not the Humboldt Mining Company claims any property up there that is not patented?

A. I don't know it.

Q. You do know there is no mill site or property there belonging to the Humboldt Mining Company that is not patented; and you have included that property in this map, haven't you?

A. I have included part of it in that.

Q. How much of it?

A. I could not say how much. [154—4]

Q. Under whose instructions did you make this map?

A. Under the instructions of an officer of the Alaska Juneau Company.

Q. Under Mr. Kinzie's instructions?

A. Yes, sir.

Q. He told you what property to include in there and what not, didn't he?

A. He gave me an outline of what he wanted; yes, sir.

Q. Now, down at this point where the Alaska Juneau bunk-house and Gold Creek tunnel are, is there any property in there that you have included that is in dispute or belongs to some other company?

A. Not that I know of.

Q. Have you included in the exterior boundary lines of this plat and map two mining claims, one of

(Testimony of R. G. Wayland.)

which is known as the Canyon and another which is known as the Oregon—both the Old Oregon claim and the New Oregon claim?

A. Part of the Oregon is there—the Canyon is not.

Q. The Canyon is not included within the boundaries—the exterior boundaries of the ground you claim belonging to the Alaska Juneau?

A. No.

Q. You left that out? A. Yes.

Q. What claims cover this portion, Mr. Wayland, just above the word “Alaska Juneau Bunk-house” and the next legend “Flume, Tunnel,”—now the property that lies just north of that, what claims are in there, do you know?

A. The Wyoming Lode claim and the El Oro placer.

Q. Placer claim? A. Yes, sir. [155—5]

Q. You don't know when those claims were located, do you?

A. The Wyoming lode was located in 1899—October some time.

Q. Is it patented? A. It is not.

Q. When was the placer claim you refer to located?

A. That was located in January, 1913.

Q. This last January? A. Yes, sir.

Q. Do you know whether those claims, especially that placer ground, covers property that is in dispute? A. It covers partly—

Q. It covers what is known as the Parish No. 2 or the Mackay claim, does it not?

(Testimony of R. G. Wayland.)

A. I didn't know the Parish No. 2 was in dispute, and I don't know about the Mackay claim.

Q. You didn't examine the record?

A. I didn't examine all the records.

Q. You don't know anything about a location notice of the Mackay claim being on record?

A. No.

Q. If there is a claim, either Parish No. 2 or Mackay claim, then you have included that ground as belonging to the Alaska Juneau Company?

A. If the Parish or Mackay is over the ground it is true, yes.

Q. You know where it is claimed the old boundary lines of the Parish No. 2 are, don't you?

A. Yes, sir.

Q. Then you know if the Parish No. 2 is an outstanding claim under another name, that you have included it in the exterior boundary lines of what is claimed by the Alaska Juneau Company?

A. I have included part of the ground that was occupied by the Parish No. 2. [156—6]

Q. Which part of it—and which side of the creek?

A. On both sides.

Q. Does it cover it all?

A. Not all of it.

Q. About how much is left out?

A. About one-third.

Q. Now this ground that borders upon Gastineau Channel, commences just below the town of Juneau, just below Jorgenson's mill, does it—what is known as the Jorgenson mill?

(Testimony of R. G. Wayland.)

A. Yes, it it commences on the other side of the Jorgenson mill.

Q. And extends down how far towards Sheep Creek? A. About one mile.

Q. Are those mining claims? A. Yes, sir.

Q. Located by the Alaska Juneau people?

A. Yes.

Q. By whom?

A. Located by various people—some by the Alaska Juneau—the others were purchased.

Q. Purchased by the Alaska Juneau?

A. Purchased by the Alaska Juneau; yes, sir.

Q. You claim that this whole ground bordering on Gastineau Channel on this map and plat is owned by the Alaska Juneau, either by locations made by them or that they have purchased, do you?

A. Yes, sir; everything included within the boundaries as shown on that map.

Q. How far down—what object is there on the ground that you can specify is near the lower end line of this map going down to Sheep Creek?

A. Southeastern tower of the transmission line of the Alaska Gastineau Company as it crosses the big slide.

Q. That is down here in between Sheep Creek and that space [157—7] where it usually slides in the winter, and where you spanned it with the high-power wires—high tension wires carrying the power for the Alaska Juneau?

A. Yes, sir.

Q. You know of your own knowledge—you are

(Testimony of R. G. Wayland.)

testifying that the Alaska Juneau own it, as you have stated?

A. That is the best of my knowledge; yes.

Q. I want to know how positive you are, Mr. Wayland? Do you know anything about it by reason of having examined the records, or did you just take Mr. Kinzie's word for it?

A. He has examined the records and perhaps he can tell you more definitely on that, if you want to ask him about it.

Q. I believe you stated a while ago that you made this considerably under the instructions of Mr. Kinzie as to what he wanted on there?

A. Not in detail.

Q. To what extent did you follow his instructions?

A. I was instructed to make a map showing all of the property of the Alaska Juneau Gold Mining Company, similar to the one made last year.

Q. And all it claimed?

A. All it claimed and all it owned.

Q. Now these claims along down the beach, are they all mining claims? A. Yes, sir.

Q. How long ago were they located, do you know?

A. From 1895 to 1912.

Q. What are these claims that run along what is marked on here "Sea Level Tunnel, Proposed Extension," commencing down the Gastineau Channel and extending up north—what are those claims?

A. Mining claims.

Q. Those are mining claims located across the formation through there? [158—8]

(Testimony of R. G. Wayland.)

A. Partly.

Q. What is indicated by this space rather to the east here which seems like a long tunnel from Gastineau Channel up the hill?

A. Those are Summits Nos. 1, 2, 3 and 4 patented lode claims.

Q. They are patented—these others down on the sea level tunnel are not patented?

A. Not patented.

Q. When were they located?

A. September 18, 1902.

Q. How many of these claims that you have included in there, in a rough way, Mr. Wayland, have been located, say since the first of August, 1910?

A. Perhaps 50.

Q. Perhaps 50 of these claims. Where it what is known as the Caro property with relation to any point on this map.

A. It is shown on the lower left-hand corner of the map.

Q. Where is that—will you point it out, Mr. Wayland? A. At a point marked "A."

Q. You haven't included that in the boundaries of the property belonging to the Alaska Juneau Company, have you? A. No.

Q. Now, who wrote in these various legends in here—for instance, "Point at which excavation for second New Ebner Mill was started since appropriation of Gold Creek water by the Alaska Juneau Gold Mining Company"? A. I wrote it.

Q. At whose instigation did you write that in?

(Testimony of R. G. Wayland.)

A. Mr. Hellenthal's.

Q. How much of this map did Mr. Hellenthal direct you to make? A. The inscriptions.

Q. Inscriptions were made according to his directions? A. Yes, sir.

Q. When did you say you got up the map? [159—9] A. Last week.

Q. Do you know where the boundaries of the Old Oregon claim were, Mr. Wayland? A. Yes.

Q. And it is virtually the same as what is referred to throughout this case as the New Oregon, isn't it?

A. There is some difference in the description, but the ground claimed is virtually the same.

Q. Now, this placer claim that you say belongs to the Alaska Juneau, is located on the front part of the Oregon claim, isn't it?

A. It covers part of the Oregon claim.

Q. And that location as well as the quartz location were made by the same company, and belong to the Alaska Juneau? A. Yes.

(Whereupon said map was received in evidence and marked Plaintiff's Exhibit No. 1.)

Redirect Examination.

(By Mr. JACK HELLENTHAL.)

Q. Now, Mr. Wayland, referring again to Exhibit 1 which has just been received in evidence, Judge Winn has asked you some questions with reference to the conflict between the Humboldt patented ground and some claims that are shown there—the claims shown there are simply the outlines of the claims as located, and lap over the patented ground, is that

(Testimony of R. G. Wayland.)

correct? A. That is true.

Q. Simply in order to clear up the claim and clear up the end lines? A. Yes.

Q. And only took in a very small fraction of the patented area of the Humboldt Company from as far as it is shown there? A. Yes. [160—10]

Q. The claim is merely located in the form of a parallelogram upon the ground, and in order to preserve that shape of the claim it is necessary to lap over the patented ground? A. Yes, sir.

Q. As far as those Perseverance claims are concerned, they are small? A. Small.

Q. Very small? A. Very small fractions.

Q. In regard to the claims on the beach here—you said they were mining claims; I direct your attention to the fact that there are some mill sites along there?

A. Mill sites and mining claims both—I understand mill sites and mining claims are both mining claims.

Q. You have spoken of the mill sites and claims as lode claims? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

(Whereupon an adjournment was taken until 9:30 to-morrow morning.) [161—11]

MORNING SESSION.

June 23, 1914, 9:30 A. M.

The plaintiff, to further maintain the issues on its part, called as a witness R. A. KINZIE, who having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of R. A. Kinzie, for Plaintiff.

Direct Examination.

(By Mr. JACK HELLENTHAL.)

Q. Your name is R. A. Kinzie? A. Yes.

Q. You are the General Superintendent in charge of the Alaska Juneau Mining Company's operations?

A. I am.

Q. How long, Mr. Kinzie, have you been connected with the Alaska Juneau Gold Mining Company as General Superintendent?

A. Since some time in 1904.

Q. Prior to that time did you have any connection with this same company? A. I had.

Q. In what capacity were you engaged with that company prior to 1904?

A. Assistant Superintendent.

Q. How long did you serve in that capacity?

A. Since February, 1901.

Q. Now, Mr. Kinzie, are you familiar with the plans of operations of the Alaska Juneau Gold Mining Company? A. I am.

Q. Have you been familiar with these plans and the operations of this company ever since your connection with it both as Superintendent and General

(Testimony of R. A. Kinzie.)

Superintendent and as Assistant General Superintendent? A. I have.

Q. You have, during all that time, been made familiar with the property of the company? [162—12]

A. I have; yes, sir.

Q. You are acquainted with the Ebner Gold Mining Company? A. I am.

Q. And with their properties? A. I am.

Q. You know the property in dispute in this case—that is to say, you know the location of Gold Creek upon the ground? A. I do; yes.

Q. And the properties surrounding the property in dispute, in a general way? A. I do; yes.

Q. Now, when you first became connected with the Alaska Juneau Gold Mining Company, Mr. Kinzie, what did the company have in the way of a milling plant?

A. In 1901 the company had a 30-stamp mill in Silver Bow Basin, and also a 5-stamp mill in Silver Bow Basin.

Q. It had a milling plant of a capacity at that time—total capacity of 35 stamps?

A. Total of 35 stamps; yes, sir.

Q. That was located in Silver Bow Basin?

A. Yes, sir; in Silver Bow Basin.

Q. Where is that situated with reference to the shore of Gastineau Channel?

A. It is located about two miles north of the shore of Gastineau Channel, running parallel with the shore of Gastineau Channel.

(Testimony of R. A. Kinzie.)

Q. Where is it with reference to the present mill site of the Alaska Juneau Company?

A. It is right back of a ridge of a line of mountains about 2 miles north of the present mill site of the Alaska Juneau.

Q. There is a line of mountains between Silver Bow Basin, where this mill is situated, and the present mill site of the Alaska Juneau Company? [163—13]

A. There is; yes.

Q. At that time, Mr. Kinzie, what if any plans did the company have with reference to the enlarging of its plant and operation—when you first became connected with the company?

A. The plan then contemplated an enlarged milling plant situated at some point on the shore of Gastineau Channel. Up to that time the milling plant in Silver Bow Basin, as well as the development, had been primarily sampling.

Q. The plant was too small to be of commercial value?

A. The plant was not only too small, but on account of the climatic conditions in Silver Bow Basin you could only run approximatly during five months of the entire year which necessitated the closing down of the mine for a term of seven months in the year; for that reason it was decided to get to some point where the milling plant could run the entire year, and at some point where jacket water as well as water for other purposes was available.

Q. Now, Mr. Kinzie, what were the company's

(Testimony of R. A. Kinzie.)

plans at that time—how did they intend to operate—at the time you first became connected with the company in 1901?

A. The plans as outlined at the time of my arrival were practically the same plans as have since been carried out—that is, it contemplated a mining plant in Silver Bow Basin, the driving of a tunnel from there to some point on Gastineau Channel—or from Snow Slide Gulch; the location of a mill near tide water and the transportation—and the installation of a transportation system from the mine to the mill situated on Gastineau Channel.

Q. What had been done at that time looking towards the execution of that plan?

A. There had been a line of claims located from the property in Silver Bow Basin to Jualpa Basin, situated just back of Juneau, covering the ground of the proposed tunnel [164—14] from the foot of Snow Slide Gulch to a point immediately beyond the workings in Silver Bow Basin.

Q. What claims were included within the group so located?

A. Idaho, Colorado, Wyoming, Maryland and Nevada—I think the Nevada was in the same group; they were located on the hill; the Oregon, Colorado and Idaho are located near the foot of Snow Slide Gulch; the other claims are further up on the hill.

Q. That was the first step taken to carry this plan into execution? A. Yes.

Q. And that had been done when you arrived here?

A. That had been done before I arrived.

(Testimony of R. A. Kinzie.)

Q. Now, after your arrival what was done in that connection—what was done looking towards the installation of a larger milling plant—what did you do at the mine first in the way of development work and prospecting—in a general way, Mr. Kinzie?

A. At the mine the work of sampling the property by means of a 30 stamp mill and 5 stamp mill were continued uninterruptedly up to about a year ago. The property itself was developed by a number of long cross cut tunnels; by the mining of ore from open pits and the sampling of all exposed portions of the mine. Toward following out the scheme as outlined by me a few minutes ago, a second line of claims was located and afterwards patented from the *the* property in Silver Bow Basin to a point immediately below the town of Juneau on Gastineau Channel. But this route was discontinued for a time, and a more feasible route, and the best route—namely, that from the foot of Snow Slide Gulch to the point where the Alaska Juneau mill is *not* located was continued. In this connection the necessary right of way, the necessary site for the milling plant, transportation [165—15] route, and so forth, were located or acquired by purchase.

Q. Now, when—at what time was your mine in a position to require the erection of a mill; when had the development work in your mine reached the point where the construction of an enlarged mill became an immediate necessity?

A. This question was practically decided in the year 1909.

(Testimony of R. A. Kinzie.)

Q. 1909? A. Yes.

Q. And where had you planned to get the water to operate this new milling plant?

A. From a point on the Oregon claim on Gold Creek, at the exact location of the point where our present dam is now located, or the dam of the Alaska Juneau Company.

Q. In that vicinity? A. In that vicinity.

Q. How was the water at that time to be conveyed to the milling plant on the beach?

A. The original plan was to carry the water so located by means of a flume following the contour of the hill to a point on Gastineau Channel; this route was afterwards shortened by driving a tunnel through Mt. Roberts, as indicated on Exhibit No. 1.

Q. Now, what you done, Mr. Kinzie, in the way of making preliminary surveys and things of that character in relation to that—had this been done prior to 1909?

A. All the preliminary work in connection with the claims and contemplated work had been done at that time.

Q. The preliminary work necessary to establish the feasibility of the plans had been done prior to that time?

A. Had been done prior to the years 1909 and '10.

Q. Now, in the year 1910 what, if anything, did you cause to *to* be done in the way of surveying a preliminary line and securing [166—16] the level for a flume line from the point of intended diversion to the place where the mill was to be constructed on

(Testimony of R. A. Kinzie.)

the shore of Gastineau Channel?

A. In the early part of July, 1910, a preliminary line was surveyed from a point here above Gold Creek to a point on Gastineau Channel, above the location of our Utah claim, and the necessary rights of way were acquired or located for the proposed flume and tramway.

Q. Following this, what did you do in the way of causing a location to be posted?

A. As soon as we had acquired the necessary rights of way and were ready to go ahead with the construction of our flume, pipe line, and so forth, we had the necessary water located on Gold Creek.

Judge WINN.—I move to strike that out as not the best evidence—the location notice is the best evidence—it is not shown that the witness knows anything about the posting of it.

The COURT.—The answer is objectionable because it uses “we had the water located.”

Mr. HELLENTHAL.—Let that part of it be stricken.

Q. What did you do in the way of directing—did you direct anyone in your employ to locate the water rights?

A. I directed one L. D. Mulligan to locate 20,000 inches of water at an indicated point on Gold Creek.

Q. When was that?

A. That was on August 1, 1910.

Q. L. D. Mulligan was in the employ of the Alaska Juneau Gold Mining Company? A. He was.

Q. And went there as its agent and employee to

(Testimony of R. A. Kinzie.)

make this location for it? A. He did. [167—17]

Q. What did you do in the way of commencing active construction work looking towards the diversion, use and application of the water sought to be appropriated?

A. On the same day that I sent L. D. Mulligan to locate the water of Gold Creek, I sent O. M. Harri to Gold Creek to make the preliminary arrangements to accommodate a crew of men who were to work on the construction of the flumes, tunnels, and so forth, for the conveying of the water from Gold Creek to the shore of Gastineau Channel.

Q. By preliminary arrangements, what do you mean, Mr. Kinzie?

A. By preliminary arrangements I mean the construction of a house in which the men were to live; the construction of trails and roads to the points where the men would work; there would be no use in my sending men—

Judge WINN.—I object to that; it is argumetative.

The COURT.—You have answered the question, Mr. Kinzie.

Q. Now, Mr. Kinzie, what were the natural conditions convering the point where the location notice was posted and where the work had to be done—Mr. Kinzie, do you know where the location notice was posted by Mr. Mulligan? A. I do.

Q. Did you see it on the ground afterwards?

A. I did.

Q. Was it posted at the point where you intended

(Testimony of R. A. Kinzie.)

it to be posted, approximately? A. Yes.

Q. And that was the point of intended diversion?

A. Approximately; yes.

Q. Are you familiar with the conditions of the ground, near the point of intended diversion?

A. I am.

Q. A flume had to be built in order to convey the water? A. It did. [168—18]

Q. Do you know the natural conditions surrounding the place where the men had to work in order to carry out this work, this construction work, in connection with the diversion and the application of the water? A. I do.

Q. Now, you may state what is the natural condition?

A. The natural conditions on both sides of Gold Creek in the vicinity of the posting of the notice are extremely rough and rugged; the sides of the canyon are precipitous and for the most part are composed of rocks and cliffs.

Q. What, if any, vegetation is there in the neighborhood?

A. There is very little vegetation, and what there is consists of short alders growing just above the cliff, on the level spaces.

Q. Was there any brush in the way of the men getting right to work?

A. The alder brush growing on the level spaces above, as well as the small underbrush on the side of the Gold Creek canyon where there is any dirt, are very hard to get through, and it was necessary to have

(Testimony of R. A. Kinzie.)

this brush removed before any extensive work could be done.

Q. Was there any place on the ground that the men could put a house at the time the location was made and the Mulligan notice was posted?

A. There was no place at all.

Q. Or in the vicinity?

A. There was no place in the vicinity where the men could put a house.

Q. Could lumber and material be hauled to the place where the work was to be carried on without the construction of roads and trails?

A. No; a team could not go within something more than a thousand feet of the nearest point at which we intended [169—19] to do the construction work.

Q. Now, what did you do in the way of preliminary work looking towards the diversion of that water?

A. The preliminary work of brushing out, brushing trails for getting the lumber for the construction of a bunk-house from a point below the Jualpa dam to the selected point on the shore of Gold Creek.

Q. Now, just one question there—the lumber could be landed—the teams could go as far as what is called the Jualpa dam? A. They could; yes, sir.

Q. Now, where is the Jualpa dam situated, with reference to the point at which the Mulligan notice was posted?

A. The Jualpa dam is situated down Gold Creek at a distance of about five or six hundred feet from

(Testimony of R. A. Kinzie.)

the proposed location of the Alaska Juneau bunk-house.

Q. That would be about how far down the creek from the place where you intended to build the dam?

A. That would be about 1500 or 1600 feet.

Q. And from the Jualpa dam up, the canyon is precipitous and covered with brush? A. Yes.

Q. And the lumber, I understand, could be delivered by teams as far up the creek as the Jualpa dam?

A. A point just below the Jualpa dam.

Q. From there on what did you do in the way of constructing trails to get the lumber up?

A. The brush on the old basin road as far as the bend immediately beyond the present Gold Creek tunnel was cleared out and brushed out and the debris removed from the trail; the trail was then cut to a point near the falls of Snow Slide gulch, and another trail to a point at the foot of Snow Slide gulch; further up the trail was constructed to the proposed site of the Alaska Juneau bunk-house, and from the Alaska [170—20] Juneau bunk-house trails were constructed on both sides of Gold Creek to the point at which the Alaska Juneau dam was constructed.

Q. Now, what do you say as to the necessity of constructing these trails before men could be placed to work on the ground?

A. Trails were essential, and work had to be done on the grade so that men could get to and from their work.

Q. What do you say as to the necessity of these trails in order to get the material to the place where

(Testimony of R. A. Kinzie.)

the dam was to be constructed and the bunk-house built?

A. It would also be essential for the same reason.

Q. And the material could not be got there without the trail? A. No; it could not.

Q. Who did you send down there first, did you say, to do this work? A. Mr. O. M. Harri.

Q. What instructions did you give him?

(Objection sustained—question not answered.)

Q. What did you send him up there for, Mr. Kinzie?

A. To start the preliminary work of the appropriation of the water from Gold Creek.

Q. What did the preliminary work consist of?

A. That preliminary work consisted of cutting trails, building the bunk-house, blacksmith-shop; in fact all of the preliminary work necessary for the starting of work for the appropriation of the water.

Q. What, if any, authority did Mr. Harri have to employ other men to help him?

A. He was instructed to employ as many men as he needed to continue the work in a workmanlike manner.

Q. When were you on the ground for the first time, Mr. Kinzie, after the posting of the Mulligan notice? [171—21]

A. To the best of my recollection it was on the 3d of August.

Q. What, if anything, did you find upon the ground at that time in the way of work that had been done by Mr. Harri or men working under him?

(Testimony of R. A. Kinzie.)

A. To the best of my recollection it was the 3d—at that time the trail had been brushed out from the Jualpa dam—the point where the Alaska Juneau bunk-house is constructed had been cleared of brush and a trail constructed up the left-hand side of Gold Creek to a point at which a plank spanned the creek to the right-hand side of Gold Creek; I didn't get beyond that point.

Q. Not on that day?

A. Not on that day; I met Harri just below that point, and we went as far as where the plank spanned the creek and stopped there.

Q. The trail had been started and at least partly constructed between the Jualpa dam and the site of the Alaska Juneau bunk-house, and some trail had been built above the bunk-house going up the creek?

A. From as far as what is known as the Jualpa dam to the bunk-house, and from the bunk-house to the plank which was placed across Gold Creek.

Q. Part of the trail lay between the bunk-house and the present Alaska Juneau dam? A. It did.

Q. And the balance lay between the bunk-house and the Jualpa dam?

A. The first part referred to was between the Jualpa dam and the Alaska Juneau bunk-house.

Q. And the second one lay between the Alaska Juneau bunk-house and the present Alaska Juneau dam?

A. From the bunk-house to the Alaska Juneau dam, upstream from the Alaska Juneau bunk-house.

(Testimony of R. A. Kinzie.)

Q. Now, do you remember seeing any other men on the ground there that day except Mr. Harri, or is your recollection clear upon that?

A. My recollection is not clear upon that point; I was directed to where Harri was but I cannot positively say who directed me on the 3d of August.

Q. When next did you go upon the ground?

A. I am pretty sure it was the 6th of August, the next time I was on the ground.

Q. At that time how far had the work progressed?

A. The trails from a point below the Jualpa dam to Snow Slide gulch and had been brused out; steps had been cut down to Snow Slide gulch; a trail had been constructed from the foot of Snow Slide gulch to the site of the Alaska Juneau bunk-house; the work of constructing the bunk-house had been started, and the trails up Gold Creek had been run on both sides of the Canyon, one trail going up the right-hand side of the creek to the Jualpa flume, and the trail on the other side of the creek up over the Borien Pit dump to the same plateau just above the cliff.

Q. At that time do you remember how many men you saw on the ground besides Mr. Harri, or do you remember that?

A. There were a number of men—I remember four or five of them distinctly, there were two Indians; there was an old carpenter by the name of Dempsey; there was a one-eyed man by the name of Burg, and some other men helping. Now, I have since learned who those men were, but didn't remember it until I had looked the matter up.

(Testimony of R. A. Kinzie.)

Q. At that time had the material arrived on the ground for the bunk-house?

A. Lumber had arrived upon the ground, but whether it was all delivered over there I am not sure.

Q. There was material there and they were putting up the [173—23] house?

A. Part of the lumber was in Snow Slide gulch, and part of the lumber was on the site of the bunk-house, and the carpenters were at work.

Judge WINN.—What date is this?

A. That is the 6th of August.

Q. From then on, Mr. Kinzie, how frequently were you on the ground?

A. I was there practically every two or three days—might be less, might be more.

A. Every two or three days for how long a period of time?

A. Up to the month of December, or latter part of November of that year.

Q. How many men did you have employed from the 1st of August up to—when was the time the water was first put to use, Mr. Kinzie?

A. I think it was November 17th.

Q. Now, between the time that the water was put to use on November 17th and the time that Mr. Harri first went up there on the 1st of August, how many men did you have employed on that job?

A. We employed from one man on the 1st of August to 50 or 60 men during the month of November, 1910.

Q. You had one on August 1st, that is to say,

(Testimony of R. A. Kinzie.)

Harri, and ran up to as high as 50 or 60 at one time?

A. Yes.

Q. How did the number of men that you had on the ground at any one time compare with the number of men you could use to advantage in prosecuting the work?

Q. We worked every man that we could advantageously work at all times from the time the water was first appropriated to the time the water was put to use.

Q. I will ask you now, Mr. Kinzie, as to how the work was [174—24] carried on, commencing on the 1st of August, up to the time that the water was put to use, with reference to its being carried on continuously or otherwise?

A. The work was continuous from the time of the location of the water up to the time that it was actually put to use.

Q. Was there any time when there were not men working on the ground?

A. No time from the time the water was located until it was finally put to use.

Q. Now, when was it that the preliminary work, such as the construction of trails, roads, accommodations for men to live in, and things of that character had reached the point where you could put men to work on the actual work of grading off the flume grade?

A. That was in the latter part of August, 1910.

Q. What did you do then in the way of establishing the grade for the flume?

(Testimony of R. A. Kinzie.)

A. The flume grade was established, and the work of tunneling, or starting the tunnels to convey the water through the mountain under Snow Slide gulch was also started.

Judge WINN.—What date is this?

A. That was in the latter part of August, 1910.

Q. Now, when you speak of a tunnel to convey the water under Snow Slide gulch, I wish you would explain to the Court what that tunnel consists of, and why you drove that tunnel, and where it is driven?

A. The tunnel is driven from a point on Gold Creek just—

Q. Is this the big tunnel?

A. No; this is the water tunnel going in under Snow Slide gulch from a point just above the Alaska Juneau bunk-house and coming out near the mouth of Gold Creek tunnel. It is impossible to convey the water by means of flume or pipe across Snow Slide gulch on account of the slides of snow [175—
[25] and dirt, and it was for this reason that the tunnel was driven; it is driven for the purpose of conveying the water, and for no other purpose.

Q. A flume built around the cliff there would be periodically taken away by slides?

A. It would be taken out every winter by snow slides.

Q. That was started some time in August, the preliminary work on it?

A. The preliminary work was started in the latter part of August.

Q. When was the actual work of construction of

(Testimony of R. A. Kinzie.)

that tunnel commenced?

A. The water tunnel was started there either in the latter part of August or the first part of September, and the actual construction work was started a few days later.

Q. In the early part of September?

A. The early part of September.

Q. Prior to this time had there been any intermission in the work?

A. There was no intermission in the work.

Q. Work had been carried on continuously in the vicinity of the point of diversion, in the way of preliminary work?

A. Work had been carried on from the point where the water was to be diverted to a point just below Snow Slide gulch.

Q. This work was all in the vicinity of the point of diversion?

A. It was all in the immediate vicinity of the point of diversion; yes, sir.

Q. And that had been carried on daily and continuously from the 1st of August up to the time we now speak of? A. Continuously.

Q. When the work was completed in the way of driving these tunnels, did you then continue the other work?

A. The work of grading and the work of preparing the dam was [176—26] started and continued.

Q. Other men were employed for that purpose?

A. Other men were employed for that purpose.

Q. And what was done in the way of road build-

(Testimony of R. A. Kinzie.)

ing, and things of that character while this tunnel was being driven—was that still prosecuted?

A. The necessary roads, trails, and so forth, were continued and improved from time to time so the men could go conveniently to and from their work.

Q. And the material?

A. And materials conveyed to and from the point of use.

Q. Now, when was it that you built the dam in Gold Creek?

A. The work on the dam was started in the latter part of September, but the men were interfered with from time to time, and it was not until the 3d of October that the dam was sufficiently constructed for the first part of the flume to be installed.

Q. Who interfered with the men?

A. Men working on the opposite bank—on the opposite bank from where our men were working on Gold Creek.

Q. Who were they working for?

A. These men, to the best of my knowledge, were working for the California-Nevada Copper Company.

Q. What were they doing?

A. Blasting rocks on the hillside—blasting rocks and rolling them down the hillside to the point where our men were working.

Q. How was this work carried on—was it in the way of mining operations or to interfere with the operations of your men below—in a general way, how was it carried on?

(Testimony of R. A. Kinzie.)

A. The men were posted along the hillside just opposite from where our men were trying to build the dam, and as soon as our men would approach the point at which the dam was [177—27] to be constructed—our men at work in the bed of Gold Creek—the men above would start blasting and roll rocks down the hillside on and over the point where our men were trying to work. This, of course, necessitated our men getting out of the way, and as soon as they would get out of the way the operations on the opposite hillside would cease; if they would attempt to go down again into the bed of the creek the same thing would be repeated.

Q. It was under those conditions that you finally got your dam in? A. It was.

Q. When was that?

A. That was on October 3d, 1910.

Q. You started to build the flume, when?

A. On October 3d, 1910.

Q. And as soon as you built the flume, what did you do towards turning the water through the flume?

A. The water was turned through the flume immediately.

Q. Commencing on what day?

A. On October 3d, 1910.

Q. What volume of water did you carry in that flume?

A. It was carrying practically full.

Q. What was the size of the flume that you started to put in—how did that flume that you put in there then compare with the flume that is in there now, in size?

(Testimony of R. A. Kinzie.)

A. That flume is practically the same size as the flume now installed.

Q. No material difference?

A. No material difference.

Q. Installed on practically the same grade?

A. Practically the same grade.

Q. Carried the same volume of water that it now carries?

A. The first part of the flume, yes. [178—28]

Q. Now, on October 3d, when that dam was built, how far had your work on the grade and the tunnel progressed, Mr. Kinzie?

A. The flume grade had been constructed from a point on the left-hand side of Gold Creek just below the cliff to the mouth of the tunnel under Snow Slide gulch; there were men working cutting a shelf through the cliff at a point about 150 feet below the site of the present Alaska Juneau dam, and there was a crew or men working in the water tunnel under Snow Slide gulch.

Q. I hand you here a photograph, Mr. Kinzie, marked for identification Plaintiff's Exhibit No. 2, and ask you to look at it and state if you know when that photograph was taken? A. I do.

Q. When was it taken, Mr. Kinzie?

A. Taken on the morning of October 4th, 1910.

Q. Were you present when it was taken?

A. I was present, yes.

Q. Does that photograph correctly represent the conditions existing on the ground as shown in the picture? A. It does.

(Testimony of R. A. Kinzie.)

Q. And shows the flume grade just as it was on that morning of October 4th?

A. Shows the flume grade below the rock cliff just below the Alaska-Juneau dam.

Q. There had been portions of the flume grade constructed that are not in the picture, is that true?

A. The portions further up the creek.

Q. Doesn't show on the picture?

A. This picture only shows a portion of the grade close to the water tunnel under Snow Slide gulch.

Q. At any rate, that condition existed on the part of the grade that is shown in the picture on October 4th? [179—29]

A. I did.

Mr. HELLENTHAL.—I offer that picture in evidence.

The COURT.—How much territory is covered there, in length?

The WITNESS.—Following about that contour, it would be about a mile and a half.

The COURT.—And how far is it from the tunnel to the left-hand edge of the picture?

The WITNESS.—About 300 to 500 feet.

The COURT.—It will be received.

(Whereupon the said photograph was received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. I hand you here a photograph, marked for identification Plaintiff's Exhibit No. 3, and ask you to look at it and state if you know when that was taken? A. I do.

Q. When was that taken?

(Testimony of R. A. Kinzie.)

A. On the morning of October 4th, 1910.

Q. Were you present when it was taken?

A. I was present.

Q. Does that correctly represent the matters and things shown upon the photograph as they existed that morning? A. It does.

Q. Explain in a general way what it shows, Mr. Kinzie.

A. In the lower left-hand corner of the picture it shows the logs of the Alaska-Juneau dam as they were placed on the morning of October 4th; it also shows the condition of the first part of the Alaska-Juneau flume on the morning of October 4th after it had been destroyed and crushed during the night by rocks rolling down the hill.

Mr. HELLENTHAL.—I offer that picture in evidence.

Judge WINN.—Who took this picture, Mr. Kinzie? [180—30]

The WITNESS.—Mr. Case.

The COURT.—Do you say you were there at the time it was taken?

The WITNESS.—Yes; I was there when the picture was taken.

The COURT.—It represents the condition of affairs that morning?

The WITNESS.—It does.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. I now hand you, Mr. Kinzie, a photograph marked for identification Plaintiff's Exhibit No. 4,

(Testimony of R. A. Kinzie.)

and ask you to look at that—were you present when that picture was taken? A. I was.

Q. When was it taken?

A. On the morning of October 4th, 1910.

Q. Does that correctly represent the matters and things shown upon the photograph? A. It does.

Q. What is shown, in a general way, Mr. Kinzie?

A. In the lower center of the picture is shown the Alaska-Juneau dam as it existed on the morning of October 4th, 1910; it also shows the Alaska-Juneau flume as it existed on the morning of October 4th, showing the crushed condition after the rocks had been rolled down upon it during the night; it also shows the foot of Miller's gulch just above the Alaska-Juneau dam.

Mr. HELLENTHAL.—I will offer this.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. I hand you here, Mr. Kinzie, a photograph marked for identification Plaintiff's Exhibit No. 5, and ask you to look at that and state if you were present when that picture [181—31] was taken?

A. I was present when the picture was taken.

Q. When was that taken?

A. On the morning of October 4th, 1910.

Q. Does that correctly represent the matters and things shown on the photograph? A. It does.

Mr. HELLENTHAL.—I offer it in evidence.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. Now, Mr. Kinzie, I hand you here a photo-

(Testimony of R. A. Kinzie.)

graph marked for identification Plaintiff's Exhibit No. 6, and ask you to look at that and state if you were present when that photograph was taken?

A. I don't remember that photograph, Mr. Hellen-thal.

Q. Don't remember that, Mr. Kinzie?

A. No, I don't remember it.

Q. I hand you here another photograph marked for identification Plaintiff's Exhibit No. 7, and ask you to look at that and see if you remember that?

A. Yes.

Q. Were you present when that picture was taken? A. I was.

Q. When was that taken?

A. That was taken the morning of October 4th, 1910.

Q. Does that correctly represent the matters and things on the ground as they existed that morning?

A. It does.

Mr. HELLENTHAL.—I offer that in evidence, your Honor.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. I hand you another photograph, Mr. Kinzie, marked for identification [182—32] Plaintiff's Exhibit No. 8, and ask you to look at that and state if you were present when that was taken?

A. I was.

Q. When was that taken, Mr. Kinzie?

A. The morning of October 4th, 1910.

Q. Does that correctly represent the matters and

(Testimony of R. A. Kinzie.)

things as they were upon the ground at the time the picture was taken? A. It does.

Q. Mr. Kinzie, what does that picture show, in a general way?

A. This picture shows on the left-hand side, water flowing down Miller's gulch; in the upper center it shows two men working to the side of the point from which the rock was rolled down upon the Alaska Juneau dam on the morning of October 4th.

Q. What are the two men engaged at, as shown in the picture?

A. They are digging out rock and rolling it down the hill.

Q. Where do these rocks land as shown in that picture?

A. They land on top of the flume and dam of the Alaska Juneau Mining Company.

Q. When was that taken—on the morning of October 4th, 1910?

A. The morning of October 4th, 1910.

Mr. HELLENTHAL.—I offer that in evidence.

Judge WINN.—Did you say you were present when this picture was taken.

The WITNESS.—I was present, yes.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 8.)

Q. I now call your attention, Mr. Kinzie, to a photograph marked for identification Plaintiff's Exhibit No. 9, and ask you to look at that and state if you were present when that photograph was taken?

A. I was. [183—33]

(Testimony of R. A. Kinzie.)

Q. When was it taken?

A. The morning of October 4th, 1910.

Q. Does it correctly show the matters and things shown upon the picture as they existed upon the ground when the picture was taken? A. It does.

Q. What does that picture show, in a general way?

A. It shows the firing of a blast on the hillside immediately above the Alaska Juneau flume and dam.

Q. What was the effect of the bomb so fired at that time at that point?

A. It was to roll the rock and dirt loosened by the blast down upon the flume and dam of the Alaska Juneau Gold Mining Company.

Q. And upon the men employed in the construction of it? A. If they were there, yes.

Mr. HELLENTHAL.—I will offer that picture.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. Now, when, if at all, Mr. Kinzie, did you first apply this water to use—the water sought to be appropriated?

A. To the best of my recollection it was November 17th, 1910.

Q. November 17th, 1910?

A. November 17th, 1910.

Q. Where was it applied to use, and to what use was it applied?

A. Put to use driving a compressor at the foot of Snow Slide gulch.

Q. On what claim was the compressor located?

A. On the Colorado Claim.

(Testimony of R. A. Kinzie.)

Q. What was the compressor used for?

A. For furnishing compressed air for driving machines and for ventilation in the Gold Creek tunnel. [184—34]

Q. How was the water conveyed to the site of the compressor?

A. The water was conveyed by means of a flume to a point on the Colorado Claim in Snow Slide Gulch, and from there out to the compressor by means of a steel pipe-line.

Q. To what extent was the water used in that compressor?

A. Practically the entire capacity of the flume—

Q. The flume in that connection, how did that compare in size with the flume that is now there?

A. It is the same size.

Q. It is the same flume?

A. A portion of the flume has been abandoned, and the water is now carried through the tunnel under Snow Slide Gulch; at that time the tunnel was not completed under Snow Slide gulch.

Q. And the water was taken around the cliff?

A. Around the cliff to the head of the pipe-line by means of a wooden flume.

Q. The work of driving this water tunnel that you have described to the Court was still in progress at that time? A. Yes, sir.

Q. That tunnel had not yet been completed when the water was applied to use? A. No, sir.

Q. But a temporary flume had been constructed around the cliff? A. A temporary flume.

(Testimony of R. A. Kinzie.)

Q. And that flume was abandoned as soon as the tunnel was completed and the new flume constructed through the tunnel? A. It was.

Q. And the flume then built was the same as the flume which is now built?

A. Same size. [185—35]

Q. And the carrying capacity of water—

A. Same thing.

Q. Now, from the time that you posted the notice of appropriation on the 1st of August, 1910, up to the time the water was applied to use on the 17th of November, 1910, was there any time when you did not employ in connection with the works necessary to the diversion and appropriation of the water, as many men upon the ground as could be profitably employed in that connection?

Q. Commencing with the date of August 1st, when Harri was the first sent upon the ground by you, and when Mr. Mulligan was directed to post the notice—commencing with that date up to the time that the water was applied to use by you on November 17, 1910, was there any time when more men could have been actually employed by you to advantage on the ground than were then actually employed?

(Objection sustained.)

Q. Well, how many men did you employ at all times during that period, with reference to having as many men as could be profitably employed, or employed to advantage, in that connection?

A. We used all the men we could use to advantage at all times from August 1st, 1910, to November 17th,

(Testimony of R. A. Kinzie.)

1910, the day on which the water was put to use.

Q. Now, after putting the water to use at the Snow Slide gulch compressor, what, if anything, did you do from then on towards completing the flume line—the flume to the mill site on the shore of Gastineau Channel?

A. The work of grading and building the flume line and also the necessary tunnels, was carried on continuously from that time to the time that the water was put to use on [186—36] the mill site on Gastineau Channel, which is the same mill site now occupied by the Alaska Juneau Company's mill.

Q. When was the water put to use on those mill sites? A. That was the spring of 1913?

Q. To what use was it then applied?

A. It was first applied to the hydraulicizing of the dirt from the hillside, for the foundations of the mill.

Q. To what extent was the water applied at that time—the entire capacity of the flume, or less?

A. Practically the entire capacity of the flume was used.

Q. For that purpose at that time? A. It was.

Q. To what extent, if at all, was the water used on the mill site since?

A. The water has been used continuously since that time?

Q. On the mill site? A. Yes.

Q. Prior to the time that you commenced using the water on the mill site, to what extent had you used it at the Snow Slide gulch compressor, where it was first applied to use?

(Testimony of R. A. Kinzie.)

A. We used all the water we had from the time the first compressor was started; and later a second compressor was started and the water used on it; there were periods during the winter time when there was not sufficient water to run the compressor, but we used all the water the flume would carry at all times.

Q. Was there any time when the water was not used—that is to say, when there was water in the creek and you didn't use it?

A. No long period, other than very short periods during a breakdown—the use of the water was continuous.

Q. From the time it was first applied to use on November 17th [187—37] to the present time?

A. To the present time; yes, sir.

Q. Either used in the compressor at Snow Slide Gulch or on your operations on the hillside?

A. It was.

Q. Now, during the time that the work commenced, or during the time that the water was applied to the Snow Slide gulch compressor—between the time the water was applied to the Snow Slide Gulch compressor and the time it was used on the hillside, what did you do in the way of construction work, looking towards the construction of a road to convey this water to Gastineau Channel. What did you have to drive, first, in the way of tunnels?

A. The necessary grade and flume—the work of constructing the necessary grade and flume was immediately started, and during the entire operation

(Testimony of R. A. Kinzie.)

of the work, when it was impossible to work on the grade the work of driving the tunnels was continued.

Q. How many tunnels did you have to drive through Snow Slide gulch between the tunnel you have already referred to and the point where the water was applied on the mill site on the Gastineau Shore?

A. Only one tunnel driven to carry water.

Q. How long is that tunnel?

A. Almost 2400 feet long.

Q. Almost half a mile long? A. Yes.

Q. Where is that driven?

A. From a point just above the town of Juneau through the ridge of Mt. Roberts, into Wood's Gulch in the Jualpa Basin.

Q. The portal of that tunnel on the Jualpa Basin side connects with the portal of the Gold Creek tunnel at Snow [188—38] Slide gulch by means of a flume line? A. It does.

Q. What did you do in the way of constructing the flume grade during this time?

A. During that time the entire flume grade and other structures were completed?

Q. And the flume built?

A. Yes; and the water conveyed from the point of intake to the point of use on the mill site on the shore of Gastineau Channel.

Q. How continuous was the work—this work of construction, from the time it was commenced until the water was conveyed to the shore of Gastineau Channel?

(Testimony of R. A. Kinzie.)

A. The work was continued from the time it was started to the present time, or to the time it was put to use.

Q. How did the number of men employed by you at all times compare with the number of men that could be advantageously used in doing that work?

A. We used every man that we could use to advantage.

Q. At all times? A. At all times.

Q. What was the approximate cost of the Alaska Juneau Company of the work done and the material used in connection with the appropriation of the water of Gold Creek, as you have just testified to?

A. I would have to check that up, Mr. Hellenthal; my impression is it is something over \$90,000.

Q. You want to look that up to be sure about it?

A. Yes, sir.

Q. Now, after the Mulligan notice was posted, you saw that on the ground didn't you? A. I did.

Q. After that, what, if anything, did you do yourself in the way of posting a notice—what was the first thing you did [189—39] in that direction?

A. An amended Mulligan notice was posted—an amended notice of water location was posted at 3:30 P. M. on the afternoon on September 14th, 1910.

Q. You posted that, Mr. Kinzie, yourself?

A. I did.

Q. For the Alaska Juneau Gold Mining Company? A. I did.

Q. What became of that notice—was that recorded? A. That notice was not recorded, no.

(Testimony of R. A. Kinzie.)

Q. How did it happen that it was not recorded, do you know? A. No, I do not.

Q. When did you first discover that that notice was not recorded?

A. Sometime during the following spring.

Q. Then what did you do in that connection?

A. A second notice was posted.

Q. A second amended notice?

A. A second amended notice was posted.

Q. Mr. Kinzie, I hand you there a paper marked for identification Plaintiff's Exhibit 19, and ask you to *look it* and state, in a general way, it is?

A. It is a water location notice.

Q. Did you see the original of that notice?

A. I did.

Q. When? Q. 8th day of May, 1911.

Q. Did you have it in your possession at that time? A. I did.

Q. What, if anything, did you do with it?

A. I posted it at the intake of the Alaska Juneau flume, where it takes the water from the Alaska Juneau dam. [190—40]

Q. Where the Alaska Juneau dam is now situated?

A. Yes, sir.

Q. How did you post it?

A. I went to the intake of the flume at the Alaska Juneau dam, and tacked the notice on a piece of a powder-box on the left-hand side.

Q. In a conspicuous place where it could be seen?

A. Either up or down, or from the left-hand or right-hand side of the creek.

(Testimony of R. A. Kinzie.)

Q. What, if anything, did you do in the way of recording the notice after posting it?

A. The notice was recorded on the same day.

Q. What day was that?

A. May 8th, 1911.

Q. And recorded on the same day?

A. Recorded on the same day.

Q. Where?

A. At the Recorder's office in Juneau.

Q. That is the recording district in which records are kept for the Harris Mining District, the district in which it is posted? A. It is.

Mr. HELLENTHAL.—I offer that in evidence—a certified copy of that notice.

(Whereupon said notice was received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. Now, what was done by you, Mr. Kinzie, in the way of constructing an enlarged milling plant under the plans as outlined by you in the early part of your testimony?

A. The grading and clearing of the ground for the first unit of the proposed milling plant has been completed and the first 50 stamps of the concentrating and regrinding machinery is now installed. [191—41]

Q. Let me ask first what is the character of the milling plant you are engaged in constructing and as determined upon—as finally determined upon under your plan of enlarged milling development—mine and milling development?

A. The milling plant is a crushing, concentrating,

(Testimony of R. A. Kinzie.)

and regrinding plant?

Q. What is the size and capacity of the milling plant now in course of construction by you?

A. The plant as at present practically completed would be able to treat about 700 tons of ore per day.

Q. And the plant that you are contemplating to erect?

A. The ultimate plant would be able to treat 12,000 tons of ore per day.

Q. Will all the water appropriated by you be necessary in connection with the operation of that milling plant? A. It will be necessary.

Q. Continuously?

A. It will be necessary for the continuous operation of the property; yes, sir.

Q. For how many years have you ore in sight in the Alaska Juneau mines now—for how many years operation of that plant? A. A great many years.

Q. Approximately how many, if you can count them—I will change that question. Approximately how many that you can positively say now that you have in sight?

A. Oh, it is a great many years, Mr. Hellenthal; I would not want to put it down for a number of years; when it is over 15 or 20 or 30 years, there is hardly any use going and farther.

Q. And the water will be necessary at all times in connection with the operation of this plant?

A. It will. [192—42]

Q. All the water?

A. All the water and more, too; we would have use

(Testimony of R. A. Kinzie.)

for more water, if we had it.

Q. What use is it put to?

A. It is used for battery, concentrating water, power, fire protection, and a number of uses.

Q. How far now at the present time have you gone with the construction of that plant?

A. At the present time the complete crushing plant has been erected, and a 50-stamp mill complete with regrinding machinery, and concentrating appliances has been installed, and 40 of the stamps are now in operation.

Q. What is the purpose of the mill that you have so far installed?

A. It has a two-fold purpose; one purpose is to guide us in the construction of the final unit, and the second purpose is to make money out of the operation of the mill.

Q. How much money, Mr. Kinzie, have you so far up to date expended, approximately, in connection with the new work done by you in connection with this mill construction, since the time that the water notice—since October 1st, 1910?

A. To get those figures exact, Mr. Hellenthal, I would like to look them up—you mean all of the work, both of mines and mills, since 1910?

Q. Yes.

A. A careful estimate, something over a million dollars.

Q. Over a million dollars? A. Yes.

Q. What are you doing now in the way of carrying on that work to completion?

(Testimony of R. A. Kinzie.)

A. That work is going on to completion as fast as we can press the work. [193—43]

Q. Consistent with good engineering methods?

A. Yes.

Q. Now, when, if at all, did the defendant first interfere with your use of the water diverted and appropriated by you as you have testified to?

A. The first direct interference was during the winter season of 1913.

Q. During the winter of 1913?

A. And the spring of 1914.

Q. You may relate what was done at that time, and all about it.

A. During the period of shortage of water in Gold Creek tunnel they constructed a working dam just above the intake of their flume to take all the water out of the creek, and passed it through the high line flume.

Q. How did that affect you?

A. It shut us down.

Q. Where was this dam with reference to your intake? A. It was above our intake.

Q. What was the effect upon the creek as far as you were concerned?

A. It cut off the water in Gold Creek and took it away from us.

Q. And you got nothing? A. Nothing.

Q. Do you know what the intention of the defendant was—did they tell you about it, whether they intended to continue that diversion, and continue to interfere with your use of the water, or not?

(Testimony of R. A. Kinzie.)

A. They told me that they would continue to turn the water out of Gold Creek to be used by themselves.

Q. The effect of that interference would be to deprive you of the water?

A. Deprive us of the use of the water when flowing in Gold Creek.

Mr. HELLENTHAL.—I think that is all, Mr. Kinzie. [194—44]

(Whereupon an adjournment was taken until 1:30 P. M.)

AFTERNOON SESSION.

June 23, 1914—1:30 P. M.

R. A. KINZIE, on witness-stand.

Mr. HELLENTHAL.—I have a couple of questions to ask Mr. Kinzie, your Honor.

(Questions by Mr. HELLENTHAL.)

Q. Mr. Kinzie, at the time, on August 1st, 1910, the waters of Gold Creek were flowing in the natural channel? A. They were.

Q. And Gold Creek is a regular stream of water?

A. Yes, sir; it is a regular stream from the mountains to the sea.

Q. I hand you here a photograph marked for identification, Plaintiff's Exhibit No 11, and ask you to look at that and state if you were present when that photograph was taken? A. I was.

Q. When was it taken?

A. In the afternoon of July 19, 1914.

Q. Does that correctly represent the matters and things shown upon the photograph?

(Testimony of R. A. Kinzie.)

A. It does.

Q. State in a general way what it shows?

A. At the left-hand lower corner of the picture it shows the flume from the Alaska-Juneau dam entering the water tunnel; it shows the grade for the temporary flume around the bluff just up Gold Creek from Snow Slide Gulch; shows the remainder of the flume at Snow Slide Gulch; shows the Alaska-Juneau bunk-house built in August, 1910; shows the location of the second stretch of buildings, and the trestle, flumes and buildings at the mouth of Gold Creek tunnel; it also shows just the end of Jualpa [195—45] dam.

Q. The end of the Jualpa dam?

A. On the right-hand side—just the end of it.

Q. The extreme lower portion of the picture?

A. The middle right-hand portion of the picture.

Q. The Gold Creek tunnel, what is the Gold Creek tunnel?

A. The Gold Creek tunnel is a tunnel running from Snow Slide gulch through the mountain to the mine workings in Silver Bow Basin.

Q. What is the length of that tunnel?

A. That tunnel is 6,538 feet.

Q. 6,538 feet? A. Yes, sir.

Q. When was that driven?

A. That was driven during the years of 1910, '11, '12 and '13, and work is still being done on it.

Q. The Alaska-Juneau ore bodies are in Silver Bow basin? A. Part of the ore bodies.

(Testimony of R. A. Kinzie.)

Q. The largest ore bodies—and this tunnel connects these ore bodies with the milling plant on Gastineau Channel?

A. Connects the ore bodies with the Alaska Juneau milling plant.

Mr. HELLENTHAL.—I offer this picture in evidence, your Honor.

Judge WINN.—Who took this picture, Mr. Kinzie?

A. Mr. Case.

Q. Were you there when Mr. Case finished up these pictures? A. At his studio?

Q. Yes, sir. A. No, sir.

Q. How do you know this is the picture he took up there at the date you have testified to?

A. Because that is the view pointed out by me to Mr. Case to have taken.

Q. Do you know, of your own absolute knowledge, that is the [196—46] picture that Mr. Case took the day you mention?

A. That is the view he took, yes.

Q. How do you know but what he may have got that picture on another day?

A. It is the exact view I pointed out to him.

Q. You don't know that this is the exact picture, Mr. Case took when you were up there that day?

A. It is the exact scene I pointed out to him, but as to the exact picture, I don't know.

Q. Do you remember, in your own mind, without the picture, that these particular improvements were there on that particular day?

(Testimony of R. A. Kinzie.)

A. The improvements?

Q. Yes, without the picture.

A. Yes, indeed.

Q. Case went up there, and you went up there with him, and he took a photograph, and took and developed it, and when did he give you any photograph that was developed? A. Next morning.

Q. And this is the same one he gave you?

A. That is one of the pictures.

Q. He gave you that morning?

A. Yes, that is one of the pictures he gave me the following Monday morning—the picture was taken on Sunday, and he gave it to me on Monday.

Q. What day did you fix this picture as having been taken on? A. July 19, 1914.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 11).

Q. Now, Mr. Kinzie, I again direct you to exhibit marked for identification No. 11, and ask you to look at it, and [197—47] ask you to state to the Court when this portion of the flume shown here to the extreme left of the picture entering the tunnel was completed—prior to what date was it completed?

A. That flume was completed—

Q. During what month?

A. In the latter part of October, 1910.

Q. Fully completed?

A. To the point that it shows in this picture.

Q. Now, the temporary grade around the bluff there, when was that built and when was the flume put on it?

(Testimony of R. A. Kinzie.)

A. That grade was built and the flume put on it during the latter part of October or the early part of November, 1910, to carry the water from the mouth of the incomplete water tunnel to the intake of the pipe-line at the compressor at the mouth of Snow Slide gulch.

Q. And that picture also shows the portion of the water tunnel that was since completed?

A. It does.

Q. When was that tunnel completed, approximately?

A. It was sometime in the year of 1912, or the latter part of the year of 1911—I don't remember exactly.

Q. You are speaking now of the water tunnel?

A. Yes, the water tunnel.

Q. After the completion of that tunnel, what was done in the way of building a flume to it?

A. The flume as shown in the picture—the water was carried into the tunnel and the water taken out the far end at a point indicated by these buildings in the upper left-hand corner of the picture.

Q. Does the mouth of the Gold Creek tunnel show in that picture, the portal of it? A. It does.

Q. How is that indicated on the picture? [198—48]

A. It is indicated on the picture by the timbering, portal and buildings; also the track running out of the portal of the tunnel to the dump.

Q. At about what part of the picture are the points that indicate the portal of the tunnel?

(Testimony of R. A. Kinzie.)

A. The upper left-hand corner.

Q. That picture also shows the bunk-house?

A. The picture shows the bunk-house built in the canyon of Gold Creek.

Q. In what month was that built?

A. That was built in August, 1910.

Q. Does it show the trails you have been testifying to?

A. No, it does not.

Q. Does that picture also show the flume line?

A. It shows one of the trails or what remains of the trail, from the Jualpa Basin to the point near the mouth of the Gold Creek tunnel.

Q. What part of the picture?

A. That comes to about the center of the picture.

Q. Now, what is that circle—does that show the flume line to Snow Slide Gulch?

A. The picture shows the tramway and also the flume line from the portal of the Gold Creek tunnel, and the main turn-out switches.

Q. When was that constructed?

A. Part of the flume line was constructed in 1911, and there have been additions put to the trestle and flume during each year since.

Q. That forms part of the line from the Gold Creek tunnel to the mouth of the No. 3 tunnel?

A. It does.

Q. About how long is that flume there, Mr. Kinzie—how many feet extending from the dam?

A. Something over 7,000 feet of flume line and tunnels combined. [199—49]

Q. Over 7,000 feet? A. Yes.

(Testimony of R. A. Kinzie.)

Q. About a mile and a half, pretty near?

A. Mile and a quarter or a mile and a half.

Q. Now, the part of the flume line between the portal of the Gold Creek tunnel and the portal of tunnel No. 3 is not shown on the picture?

A. It is not.

Q. Is below? A. Yes, sir.

Q. This also shows the compressor, does it not, Mr. Kinzie?

A. It shows the second compressor constructed at the portal of Gold Creek tunnel.

Q. When was that constructed?

A. I think that was constructed in the year of 1912.

Q. And where is that with reference to the point where the first compressor was constructed?

A. That is further down the creek, and about 100 feet away from it.

Q. That is under the snow?

A. The original compressor is under the snow shown in that picture.

Q. I hand you here a photograph marked Plaintiff's Exhibit No. 12 for identification, and ask you to look at it and state if you were present when that was taken? A. I was.

Q. When was it taken? A. July 19, 1914.

Q. Does it actually represent the conditions existing on the ground at the time the picture was taken?

A. It does.

Q. What does that show, Mr. Kinzie?

A. It shows the flume at a point near the Alaska

(Testimony of R. A. Kinzie.)

Juneau dam [200—50] along the side of the canyon at a point where it enters the water tunnel; also shows a portion of the grade from the water tunnel around the bluff above the Alaska Juneau bunk-house; on the left-hand side of the picture it shows a portion of the old Jualpa dam; the picture also shows the point on the bed of Gold Creek where the trail on the left-hand side crossed to the right-hand side of the creek.

Q. Now, Mr. Kinzie, when was that flume in there between the Alaska-Juneau dam and the—the flume on the cliff, when was it completed?

A. The flume was completed during the month of October, 1910.

Q. And does that picture show the precipitous character of the cliff along which it is built?

A. It does.

Q. I wish you would explain to the Court the character of that cliff, whether it is an easy cliff to build a flume grade across?

A. The photograph shows that it was necessary to cut a bench out of the solid rock of the cliff to enable us to place the flume around this point.

Q. For how great a distance did you have to cut this bench in solid rock?

A. The portion shown in the picture would be about 200 feet; altogether we had 500 or 600 feet of that character of work.

Q. 600 feet?

A. From five to six hundred feet.

Q. In that vicinity? A. In that vicinity.

(Testimony of R. A. Kinzie.)

Q. And you had some more lower down?

A. We had some more lower down, and some more higher up.

Q. Approximately, Mr. Kinzie, how many feet would you say [201—51] you had to cut in solid rock to lay your flume grade the entire way?

A. In the vicinity of Snow Slide Gulch to the Alaska-Juneau dam?

Q. The entire distance from the dam to the mill-site used at present, what proportion had to be cut in solid rock?

A. Including the tunnel I should say that there is approximately one-half of that way placed on bed-rock.

Q. Probably 4,000 feet, in the neighborhood of that?

A. Yes; 3500 to 4,000 feet,—3500, I think, would be close to it.

Q. In building that flume around the cliff, what did you have to get your men to do?

A. In cutting a trench or bench on that curve, the most men we could work at any one time would be two or three, and the men were placed at each end of the cliff, and where it was possible to hoist them up the cliff that was done so the rocks could be blasted.

Q. That is the way that had to be built?

A. Yes.

Mr. HELLENTHAL.—I will offer that picture, your Honor.

(Whereupon said photograph was received in evi-

(Testimony of R. A. Kinzie.)

dence and marked Plaintiff's Exhibit No. 12).

Q. I hand you here a picture marked for identification No. 13, and ask you to look at it and state if you were present when that picture was taken.

A. I was.

Q. When was it taken? A. July 19, 1914.

Q. Does that correctly represent the matters and things shown on the picture as they existed on the ground the day it was taken? A. It does. [202—52]

Q. What does it show, Mr. Kinzie, in a general way?

A. It shows the bunk-house built by the Alaska-Juneau Company in August, 1910.

Q. That was built in August, 1910? A. It was.

Q. That is a different view of it and a closer view than the other picture?

A. It is a closer view, showing the condition of the cliff, and the bench and the temporary flume to the portal of the water tunnel around in Snow Slide gulch; it also shows the position on Gold Creek where the trails were started from the bunk-house up the creek.

Q. Will you explain to the Court fully with reference to that trail?

A. It shows the point at the foot of the cliff where the trail led from the bunk-house up the left-hand side of the creek.

Q. Does it show that so it can be identified without marking it, Mr. Kinzie?

(Testimony of R. A. Kinzie.)

A. Yes, a portion of the old trail is still shown, but a portion of the trail has been washed out.

Q. Where does it show in the picture?

A. In the lower right-hand portion of the picture.

Q. That was one of the trails that Mr. Harri built?

A. Yes.

Q. What else does it show?

A. It also shows in the upper right-hand corner the dump of the Gold Creek tunnel; the second compressor building, and the track leading from the mouth of Gold Creek tunnel.

Q. That is all it shows? A. That is all.

Q. Mr. HELLENTHAL.—We will offer this picture.

(Whereupon said picture was received in evidence and marked Plaintiff's Exhibit No. 13.) [203—53]

Q. I hand you here a photograph marked for identification No. 14, and ask you to look at it and state if you were present at the time that picture was taken? A. I was.

Q. When was that taken? A. July 14, 1914.

Q. Does that correctly represent the matters and things shown upon the picture as they actually existed on the ground at that time? A. It does.

Q. What does it show in a general way, Mr. Kinzie?

A. The picture shows principally the point where Snow Slide gulch comes into the Canyon of Gold Creek; it shows the Alaska-Juneau bunk-house in the left-hand corner; shows the grade for the temporary flume; it shows the second compressor building and

(Testimony of R. A. Kinzie.)

the portal of Gold Creek tunnel; the track leading from the Portal of Gold Creek tunnel to the dump in front of Gold Creek tunnel, and the trail that led originally from the mouth of Gold Creek tunnel into the Canyon of Snow Slide gulch.

Q. That is one of the trails built by Mr. Harri in August, 1910?

A. That is a portion of the trail built by Mr. Harri in 1910. Yes, sir.

Q. Those matters as they show there all existed during 1910 and 1911—and through that period?

A. With the exception of the trail, the house and the compressor.

Q. The second compressor. Does that picture show the place where the first compressor stood?

A. No, the first compressor is under the slide a portion of the time, shown in the middle portion of the picture.

Q. The first compressor was buried by a snow slide?

A. Yes, there was snow slide there about over the same portion [204—54] as is shown in the picture.

Mr. HELLENTHAL.—I will offer this photograph.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 14.)

Q. I hand you here a picture marked for identification exhibit No. 15, and ask you to look at it and state what that shows—were you present when that picture was taken? A. I was.

Q. When was that taken? A. July 19, 1914.

(Testimony of R. A. Kinzie.)

Q. That correctly represents the things shown in the picture as they existed on the ground?

A. It does.

Q. What does it show, in a general way?

A. In the left-hand portion of the picture it shows the Alaska-Juneau dam and intake of the flume.

Q. When was that dam and intake built?

A. The dam was built—

Q. When was it completed, rather?

A. It was completed in 1910.

Q. What month, do you know?

A. No, I don't,—with the exception of the logs shown in the lower left-hand corner; it also shows the flume lying along the cliff just below the dam; it shows the cliff and falls immediately below the dam and the snow shed over the flume as it goes down Gold Creek.

Q. That snow shed was built at a later date than the flume?

A. The snow shed was built later; yes, sir.

Q. How much later?

A. The snow shed was built this spring.

Q. The flume was built before. Now, that dam, Mr. Kinzie,—is that the same dam,—where is that with reference to the point where the dam was constructed on October 3, 1910? [205—55]

A. It is exactly the same place.

Q. And is the same dam except it has been improved upon?

A. It is the same dam with the exception of the repairs and improvements.

(Testimony of R. A. Kinzie.)

Q. And it shows the falls immediately below the dam?

A. It shows about half of the falls immediately below the dam; yes, sir.

Q. What else does it show?

A. That is all it shows.

Mr. HELLENTHAL.—I will offer that picture.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. I hand you here a photograph marked for identification Plaintiff's Exhibit No. 16, and ask you to state if you recognize the matters and things shown in that picture? A. I do.

Q. What does it show, Mr. Kinzie, with reference to the properties of the Alaska-Juneau Company?

(Not answered because of objection.)

Q. Are you familiar, Mr. Kinzie, with all the things shown on that picture? A. I am.

Q. Do you know that all the things shown on the picture are correctly shown on the picture?

A. Yes, sir; as far as they relate to the Alaska-Juneau Gold Mining Company, I do.

Q. The picture represents the conditions on the ground at about what date?

A. During the month of April, 1914.

Q. And shows the Alaska-Juneau mill—when was that built? [206—56]

A. Shows the building covering the first 40 stamps—the addition to the building had not been made at that time; shows the rock house, compressor house, tramway, change house, blacksmith-shops, wharf,

(Testimony of R. A. Kinzie.)

carpenter-shops, warehouses, tramways, and so forth.

Q. When was that No. 3 tunnel constructed, the portal of which is shown in that picture?

A. Constructed during the years of 1912 and '13.

Q. Completed when? A. 1913.

Q. That is the tunnel used to convey water to the mill site. A. It is; yes.

Q. And shows the flume line from the portal of the tunnel to the mill?

A. Shows the flume line leading from the portal of the tunnel to a point beyond the mill.

Q. When was that built?

A. That was completed during the spring of 1913.

Q. And shows the work that has been done with the water in 1913? A. It does.

Q. Where the water has been applied to use, and where it is still being applied—are all those things correctly shown on the picture? A. They are.

Mr. HELLENTHAL.—We offer the picture in evidence.

(Whereupon said picture was received in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. HELLENTHAL.—That is all. [207—57]

Cross-examination.

(By JUDGE WINN.)

Q. When did I understand that you first came to Alaska? A. In February, 1901.

Q. Where had you been prior to that time?

A. I had been in Mexico.

Q. Had you known Mr. Bradley before you came up here? A. For a long time; yes.

(Testimony of R. A. Kinzie.)

Q. Had you been connected with him in business or otherwise before you came to Alaska?

A. I was employed by Mr. Bradley before I came to Alaska, yes.

Q. Were you employed by him just prior to 1901, before you came up here? A. Just prior—no.

Q. How long had it been since you had been employed prior to 1901, by Mr. Bradley?

A. About a year—maybe a little more.

Q. Who engaged you first to come to Alaska—Mr. Bradley? A. Mr. Bradley, yes.

Q. Mr. Bradley then occupied some position with the Treadwell Company and also some position with the Alaska-Juneau Company, did he? A. He did.

Q. And you came out to assume the position of Assistant Superintendent of the Treadwell, was it?

A. Yes, and of the other companies.

Q. Were you Assistant Superintendent when you first came up here of the Alaska-Juneau Company, or Superintendent?

A. No, sir; Mr. McDonald was then Superintendent of the Alaska-Juneau Company.

Q. Where was it that you and Mr. Bradley conceived of this plan of opening up and developing the property, which you testified to on direct examination? [208—58]

A. The first I knew about the plan was in the report prepared by Mr. Bradley. I think the report was prepared during the year 1900.

Q. 1900. When you first came up here, Mr. Kinzie, in 1901, how many mining claims did the Alaska-

(Testimony of R. A. Kinzie.)

Juneau Company own?

A. I don't remember offhand.

Q. Did this report that you saw of Mr. Bradley's state the number of mining claims they had at that time?

A. No, it didn't—as far as my recollection serves me, it didn't.

Q. Do you know now how many claims they had when you came up here in 1901?

A. I cannot say definitely, no.

Q. Well, approximately?

A. I should say they had between 40 and 50 claims.

Q. Where were those 40 or 50 claims located?

A. The claims were located in Silver Bow Basin; on the ridge between Silver Bow Basin, down the Canyon to Snow Slide Gulch; in the Canyon of Gold Creek, and down the Basin as far as the Jualpa Basin.

Q. You are well acquainted with this map that Mr. Wayland testified concerning yesterday—he said, I think, it was made partly under your instructions?

A. I am acquainted with it.

Q. Will you point out and indicate on this map where the property is situated that the company owned when you came here in 1901. Point it out with respect to some places that are named on there to make it so it can get into the record and read intelligently, Mr. Kinzie.

A. The property then owned by the Alaska-Juneau Company was the same as shown on Plaintiff's Exhibit No. 1 with the exception of that portion to the

(Testimony of R. A. Kinzie.)

right of Icy Gulch, or [209—59] just to the right of the word "Company" in the title "Property of the Alaska-Juneau Gold Mining Company"; also with the exception of the two portions inclosed in the orange-colored ink in the upper center of the map; at that time they didn't own the property shown immediately back of the Town of Juneau and covered by the words "Alaska-Juneau Flume" in the lower left-hand corner; they didn't own the portion included in the lower portion of the map on which the words "Sea Level Tunnel, Proposed Extension" occur; they didn't own the portion of ground as indicated and inclosed in orange lines along the north shore of Gastineau Channel; at that time they didn't own that portion of the ground as indicated in the rectangular piece just east of the words "Proposed Extension" in the lower middle part of the map. All the rest of the property as indicated, with the exception of the property marked "Property of the Alaska-Juneau Gold Mining Company," just west of the words "Ebner Dam" on the middle left-hand portion of the plat was owned by them at that time.

Q. You have excepted from this exhibit now, as well as you remember, the property that the Alaska-Juneau did not own in 1901, when you first came to Alaska?

A. I have excepted the portions that they have acquired since that date.

Q. Does the Alaska-Juneau own all this property over here that is called "Property of the Alaska-Juneau Gold Mining Company," that is indicated

(Testimony of R. A. Kinzie.)

on the west extreme by a rectangular figure, and also this rectangular figure that intersects another?

A. They own outright a portion of the ground included within the rectangular figures as shown. A lode claim is a rectangle—is 600 or 1500, and the claims as re-established conform [210—60] to those dimensions as shown on the plat.

Q. That is the only portion of that piece of property that you claim that the company owns now?

A. Yes.

Q. That is the old Russell claim?

A. Russell and Jeff.

Q. Two of them? A. Yes.

Q. Those claims were taken up by the company when? A. 1910.

Q. You know that that property is also claimed by the Ebner Gold Mining Company, don't you, or the Humboldt Company?

A. I believe a portion of the property is, yes.

Q. There was a placer claim up there, too, which they claim?

A. Yes, I believe they claim a placer claim.

Q. Now, then, in 1901, at the time you conceived this plan of opening up the property, did you have a personal conversation with Mr. Bradley, or just see his report? A. I didn't conceive the plan.

Q. How much before Bradley came up—

A. It was his report that I read, yes.

Q. When did you ever have any talk with Mr. Bradley about this plan?

A. I think it was during his first visit that year;

(Testimony of R. A. Kinzie.)

I don't remember exactly the first conversation we had with reference to the Alaska-Juneau property.

Q. Some time you think in 1901 or '02?

A. It must have been 1901.

Q. Why do you say it must have been?

A. Because his first visit after I was up here was during the summer of 1901.

Q. Then you confirmed this plan of opening up and developing the property? [211—61]

A. I had nothing to do about confirming the plan at all.

Q. Did he confirm it?

A. There were a number of plans outlined, two principal plans—really three—and the work from that time on was simply to determine the best plan to adopt.

Q. Now, then, at that time you had the property that you have just gone over on this exhibit; you mention now the other properties on the west side—

A. That is east, Judge.

Q. East of Icy Gulch where the word "Company" occurs—that has all been located since then?

A. That portion has been located,—no, there is a portion of that ground that has not, but the extreme east part of it has been located since then.

Q. Approximately what time did you commence the location of that property indicated?

A. Oh, there were claims located along in there every year since I have been here, with different objects in view.

Q. Does that extend over the ridge near where the

(Testimony of R. A. Kinzie.)

well known Ground Hog mining claim is located—
or does it extend on that ridge down towards Sheep
Creek? A. Oh, no.

Q. How far does it come down on the ridge below
here where it is marked “Mine Workings”?

A. It comes up on the west side of Icy Gulch Can-
yon.

Q. What distance?

A. The distance shown there.

Q. I know, but I mean approximately in feet or
miles, or something of that kind.

A. I should say that is about 2,000 or 2,500 feet.

Q. You say some of those claims have been located
every year since you came here?

A. Those particular claims? [212—62]

Q. Yes, that cover that space of ground.

A. Oh, no; I don't say those particular claims were
located every year, but there have been additions each
year to the Alaska Juneau Company's holdings.

Q. But I am talking about this addition.

A. I think that addition has been made up of lo-
cations at different times.

Q. Since when?

A. I don't recall the date of the locations made
there.

Q. Can you offhand give me, Mr. Kinzie, the names
of the mining claims marking the exterior boundary
line on the east side of this exhibit, which is indi-
cated by the lines that cross this Icy Gulch and run on
down to the extreme west part of it, and then start
back in a zigzag way to the westerly part—can you

(Testimony of R. A. Kinzie.)

tell me approximately the names of the claims that you have in there that these lines I have indicated form the exterior boundary line of—any of them?

A. No, I cannot without referring to the map.

Q. This map, you mean?

A. There are a number of claims in there, and I don't remember the exact claims which form the boundary as indicated there.

Q. How many of those claims have you located since August, 1910?

A. I don't remember the exact number offhand.

Q. Now, you excepted another piece just above the words "Mine Workings" on this map—do you remember what the mining claims on this map mark the exterior boundary lines of?

A. The lower portion—no, I don't; I don't remember the exact names of the claims forming the exterior boundaries as indicated there.

Q. When were they located? [213—63]

A. A number of years ago; I don't remember the exact date.

Q. Since 1910, or before?

A. I rather think those were located since 1910.

Q. Now, the other portions that you except in this, which are indicated along the zigzag inclosure that incloses the words "Alaska-Juneau Flume"—when were those taken up?

A. Those have been taken up at various times; we have a number of claims along there.

Q. I mean along about the "Alaska-Juneau Flume"

(Testimony of R. A. Kinzie.)

A. They have been taken up at various times in the last three or four years.

Q. How many have been taken up since August 1st, 1910, or purchased?

A. The principal portion of that ground was located before August 1st, 1910.

Q. Do you know what portions have been located since August 1st, 1910? A. Yes.

Q. What portion?

A. The portions located since are not shown there; all of this ground was located before August 1st, 1910, as indicated on this map with the exception of a piece here (indicating) that was located during the last year.

Q. What is this long narrow strip, Mr. Kinzie, that after leaving this zigzag piece of property inclosed by the "Alaska-Juneau Flume," comes on down to near "Juneau" on the beach—what is that narrow strip?

A. That is the right of way for the No. 3 tunnel.

Q. That is your tunnel that leads down to your new mill here on the beach? A. It is; yes.

Q. When was the right of way obtained?

A. I think that was in 1910 or '11—somewhere in there. [214—64]

Q. Do you remember what time—can you give me a more exact date? A. No, I cannot.

Q. You don't know whether it was 1910 or '11?

A. The right of way to the left was obtained in 1910, and if I am not mistaken, this right of way was finally completed in 1911; but the right of way for

(Testimony of R. A. Kinzie.)

the flume line as originally laid out was obtained in 1910.

Q. As originally laid out, but you don't mean as it is now,—that you obtained all that right of way during the year 1910?

A. I think most of that was obtained in 1910; there was a portion that conflicted with other ground that we got, I think during the following year.

Q. When did the company take up this property called "Sea Level Tunnel, Proposed Extension"—that long strip, rectangular in form, extending from near the beach on Gastineau Channel up northerly up the hill?

A. The negotiations for the ground for the lower part of that were started either during the year 1909 or '10; the upper portion of the rectangular piece was located during the fall of 1913.

Q. The upper portion of it?

A. That is, the middle portion.

Q. Now, what portion, commencing where the rectangular portion of it ends down toward Gastineau Channel, up to the end of the line upon which the words "Proposed Extension" occur—what portion of that did you own prior to August 1st, 1910?

A. The portion below the letter "T" in tunnel, of "Sea Level Tunnel."

Q. You mean between the letter "T" in "Gastineau Channel" and the letter "T" in tunnel?

A. The latter "T" in "Gastineau Channel," with the exception [215—65] of some small pieces along the shore.

(Testimony of R. A. Kinzie.)

Q. Now, the part from "T" on up, when did you take that up?

A. The portion from the letter "T" to the top of the triangle was located during the year of 1913.

Q. As mining claims?

A. Mining claims; yes.

Q. Have you commenced a sea level tunnel to run through there now? A. We have.

Q. Now, when did you obtain the other triangular piece just to the seaward of this property we have just been talking about?

A. That is all patented property and was acquired,—I think the patent to the property was issued in 1905 or '06.

Q. That piece of property was one of the pieces of property that you took up and acquired title to in order to use it in connection with one of your schemes of opening up and developing the plaintiff's property, was it not?

A. That was a piece of ground acquired at that date in case that the proposed scheme of driving a tunnel from the shore of Gastineau Channel to the ore bodies in Silver Bow Basin had been carried out. That property has been patented, as I say, for a number of years.

Q. That was, you say, acquired in this manner pursuant to a scheme you and Mr. Bradley had for developing the property? A. Yes.

Q. Now, when did you change your mind about opening it up on that plan, or is that some other plan?

(Testimony of R. A. Kinzie.)

A. I don't think, Judge, you can fix any definite time as to changing our mind; there was a great deal of work done on that scheme during the years of 1903 and '04 and previous to that time, and the tunnel was stopped, I think, during the year of 1904; there had been work done there [216—66] during the years of 1902, '03 and '04, and the last work done on that tunnel—I don't wish to be exact on it, but I think it was during the year of 1904 or '05.

Q. That is a tunnel that you started to run through this triangular piece that is to the eastward of the triangular piece which has the words "Sea Level Tunnel, Proposed Extension"?

A. This rectangular piece.

Q. Do you know how far you ran that in—the tunnel?

A. That is in, I think it is from three to six hundred feet—I don't remember exactly the distance.

Q. Now, that is the first tunnel that you and Mr. Bradley talked over in connection with your first scheme of opening up the property—that is the first tunnel you ran looking towards the carrying out of the first scheme?

A. No; the first tunnel that was really started on any of those schemes was a tunnel started on the Colorado claim, and near the foot of Snow Slide Gulch; the tunnel is now used as a powder magazine by us. It is situated just over the line on the Idaho claim and the Colorado claim, and I think can be seen on one of the photographs introduced.

Q. That is up near the Alaska-Juneau bunk-house?

(Testimony of R. A. Kinzie.)

A. To the right of that, on the Colorado claim—between the Idaho and the Colorado.

Q. Approximately where would it be with reference to some object shown on this plat?

A. It would be about an inch below the letter “G” in the words “Gold Creek.”

Q. When did you start that tunnel?

A. Work was done on that tunnel—some work was done before I arrived, and work was done on that tunnel for two or three years. [217—67]

Q. You don’t know, Mr. Kinzie, of your personal knowledge, if that tunnel was there before you came here or not?

A. I know the tunnel was started.

Q. Do you know of your own personal knowledge, not being here at that time, that the tunnel was started?

A. All I know about it is from the report I received.

Q. That is what somebody told you or the reading of somebody’s report?

A. No, there is more than that, because surveys—

Q. You know what I mean by personal knowledge, don’t you? A. Yes.

Q. You didn’t have any superintendency over that work at the time it was done? A. None at all.

Q. Had nothing to do with the Alaska-Juneau Company? A. In 1901?

Q. And the tunnel was run before you came here?

A. There were two tunnels started—one a little lower down, and the other at the place I speak of.

(Testimony of R. A. Kinzie.)

Q. Then, you don't know of your own knowledge what they were originally started for?

A. The way you ask me, I would say no.

Q. To what extent was that tunnel run?

A. That tunnel—the tunnel must be in about 50 feet from the portal—perhaps a little more.

Q. When was the last work done on that tunnel to your own personal knowledge—if it was done before you came here, Mr. Kinzie, I don't want to know?

A. Work was done in that tunnel, it was either up in 1905 or '06, I have forgotten which.

Q. Did you do any work on this other tunnel that you just spoke about a while ago, that you ran in several hundred feet on this rectangular piece down near Gastineau Channel—had you [218—68] done any work on that before you ceased work up there on the Colorado Claim? A. Yes.

Q. Well, then you did some work on the tunnel up near the Colorado Claim after you commenced the work down on the other tunnel which extended up this rectangular piece? A. Both before and after.

Q. Well, now, as a matter of fact, Mr. Kinzie, the work you were doing up there on the Colorado Claim—the tunnel—after you commenced your tunnel down here on this rectangular piece, was done with the view of doing assessment work, wasn't it?

A. That was part of the idea, yes; you might say the same thing of both tunnels—it had not been definitely decided which was the better route.

Q. You were running two tunnels here,—did you run two tunnels before you could ascertain that fact?

A. There were a number of questions that came

(Testimony of R. A. Kinzie.)

up, and in order to hold the ground the work had to be done.

Q. The only question was between the two plans, which was the better and more feasible route. Now, when did you ultimately decide upon this rectangular piece, which is to the eastward of the word "Sea Level Tunnel, Proposed Extension" should be abandoned.

A. That scheme has never been abandoned; it is not abandoned to *to* this day; in fact, we are now starting to drive a tunnel—the only change we have made, we have gone a little farther down; that is a part of the first scheme—the sea level tunnel is a more direct route to our present mill.

Q. You still expect to run both of these tunnels—the one that is called "Sea Level Tunnel," and the one to the east of it? [219—69] A. No.

Q. That isn't a part of your scheme?

A. The sea level tunnel is a part of a general scheme of opening up the mines.

Q. How much work have you done on that this year?

A. I cannot say how much has been done this year.

Q. How many feet have been driven on that tunnel since the hearing of the preliminary injunction in this case? A. None.

Q. You have had plenty of water, haven't you?

A. It was on account of lack of water that we stopped; we had to use water in the development of our plan.

Q. That is one of the pieces of work that you say

(Testimony of R. A. Kinzie.)

was held up by reason of your not having sufficient water?

A. Yes, but we are using all the compressed air we have—every bit of it.

Q. Is that one of the reasons you claimed that you were injured at the time of this preliminary injunction—that we had taken the water away from you and you hadn't water to run but one of your compressors? A. It was, yes.

Q. But you haven't done anything on that since the application for a preliminary injunction?

A. No; we had the water—the water was taken away from us.

Q. You have had plenty of water since then?

Q. Yes, but we haven't the compressor capacity.

Q. Didn't you testify at that time that you had the compressor capacity if you had the water?

A. Yes; but we didn't have all this to work with—we have opened up the mines.

Q. How much work have you done on this other tunnel, on the rectangular piece to the east, since the hearing for a preliminary injunction? [220—70] A. None at all.

Q. Not a thing? A. None at all.

Q. Now, I will go back, Mr. Kinzie, and reach some of those points later on. Now, then, we have heard your testimony upon these two tunnels that you have testified to, which commenced somewhere near Gastineau Channel and run to the westward—I think you said this morning in the year 1909 that you did decide absolutely upon the opening up and the

(Testimony of R. A. Kinzie.)

development of the property, by running the tunnel under Snow Slide Gulch, Gold Creek tunnel, I believe you referred to it?

A. I testified partly to that, yes. During the year of 1909 I received instructions from Mr. Bradley to go ahead with that as our principal scheme.

Q. What time in 1909?

A. I can get the letters; I think they are in the courtroom at the present time.

Q. I wish you would get them to refresh your memory, if you can.

(Whereupon a recess was had for ten minutes in order for the witness to get the letters referred to.)

Q. Now, Mr. Kinzie, you know about the day in 1909 that Mr. Bradley had determined to go ahead and open up this property through the Gold Creek tunnel, which commences, I believe, up on your Colorado Claim?

A. The letter that I have is dated October 28, 1909; in that letter he referred to—

Q. I don't care for the letter—I just want you to refresh your memory as to the date. That was in October, 1909—now, what did you do in the year of 1909 towards carrying out any instructions that Mr. Bradley gave you in regard to that [221—71]

A. I immediately consulted with our attorney, who was then Mr. Shackleford, in regard to the—

Q. What was the first active work you did—I don't care about what Shackleford advised you?

A. You asked me what was done.

Q. I don't want any conversation—what work did

(Testimony of R. A. Kinzie.)

you do on the ground?

A. Before we located any ground or anything I had to know the proper way in which to do it; that was the first step taken.

Q. What do you mean by the proper way?

A. The proper way to locate for a tramway or flume—it took some time to find that out.

Q. When did you then do anything on the ground with regard to carrying out this scheme that was decided upon to open it up through your Gold Creek tunnel—when was the first work done on it?

A. I don't remember if the original surveys of the flume line and tram line were run that fall or not, but they were run the early part of the next year.

Q. Who did that surveying?

A. Mr. Lindsay ran the preliminary line.

Q. Where did he run the preliminary line from?

A. From the canyon of Gold Creek around to just above our Utah Claim on the shore of Gastineau Channel.

Q. When was that done, do you know?

A. That was done in the early part of July, 1910.

Q. Early part of July, 1910? A. Yes.

Q. Lindsay is the man that ran the line?

A. Lindsay, yes.

Q. Now, when you say Gold Creek canyon, where is that with reference to any object on this map?
[222—72]

A. For instance, the mouth of the Gold Creek tunnel is at the injunction of Snow Slide Gulch and the canyon of Gold Creek.

(Testimony of R. A. Kinzie.)

Q. Where did you run that line—preliminary line, on this map?

A. Approximately along the same course that is now followed by the flume.

Q. You located some claims about that time, did you not, over which your tunnel was afterwards constructed, from your compressor on up to your dam as it is at the present time constructed—did you locate any property in there then?

A. Yes, there was some property located in there then.

Q. Who located any property in there in July?

A. Above the Colorado Claim?

Q. Anywhere along the course of your flume as it was afterwards constructed, between your compressor in Snow Slide gulch and your dam as you afterwards constructed it?

A. A claim called the Datson-Oregon, I think, was located in July, 1910, as soon as the snow got out of the way.

Q. That was located over the Old Oregon Claim that your company had formerly owned, wasn't it.

A. No, it is not exactly the same.

Q. Well, it was substantially the same, isn't it, Mr. Kinzie?

A. The ground included within the Datson-Oregon is almost the same as the ground included in the Oregon in 1899.

Q. Located by Corbus?

A. Located by Corbus.

Q. And Corbus located that in 1899?

(Testimony of R. A. Kinzie.)

A. I think it was in 1899.

Q. He located it for the company?

A. For the Alaska-Juneau Company.

Q. And Datson located his for the company in 1910? A. Yes.

Q. Do you remember what day in July that was?

A. No, I don't—I don't recollect the day; it was in July, [223—73] I am quite sure, 1910.

Q. That is one of the locations you know was afterwards declared invalid, wasn't it?

A. I think it was not; that is my impression, anyway; I don't think it is a part of that claim.

Q. You know that is the same claim Judge Cushman made a ruling on and said the location was invalid, that it was located for convenience, and so forth?

A. I remember that part with reference to the Parish Claim but I don't in regard to the Oregon.

Q. Your memory is very good about the Parish, but not so good about the Oregon?

A. I think it is equally as good—and a little better.

Q. You know it is equally true that he did not invalidate the Lotto Lode Claim, don't you?

A. Yes.

Q. Now, then, you have stated two matters that you did in regard to furthering this scheme of opening up the property through your Gold Creek tunnel—or probably three things,—the location of these two mining claims, and the running of the temporary survey lines; now, what was the next thing you did in regard to carrying out this scheme of

(Testimony of R. A. Kinzie.)

opening up the property through your Gold Creek tunnel?

A. The location of the waters of Gold Creek at the point of use below the new Ebner mill.

Q. That is the location that is referred to here as the Mulligan location notice?

A. Yes, sir; the Mulligan location notice.

Q. That was on August 1st, you claim.

A. That was on August 1st, 1910.

Q. Now, in contemplation of opening up this property your Gold Creek tunnel, how many claims altogether, did you locate, Mr. Kinzie—altogether?
[224—74]

A. You mean on the enlarged scheme of opening up the property?

Q. In contemplation of opening up the property by means of running the Gold Creek tunnel, and in the manner in which you are working on it now, how many claims did you locate in contemplation of that scheme of opening it up, altogether?

A. I don't think I quite understand you, Judge—you mean during the year, 1910?

Q. Yes, sir; I mean after you had decided, agreed to Mr. Bradley's instructions, to which you testified, in 1910—in October—what other claims did you locate besides those which you have already testified to, which was in contemplation of opening it up under this Gold Creek tunnel scheme?

A. There were various claims located in the vicinity; the Oregon, Canyon and those claims were located in the vicinity of the dam; then there was a line of claims in the Jualpa Basin.

(Testimony of R. A. Kinzie.)

Q. A line of claims in the Jualpa Basin—will you indicate that they are?

A. They would be running approximately along the line of the flume marked by the words “Alaska-Juneau Flume”; we also located the claims across Chicken Ridge.

Q. Chicken Ridge is indefinite—will you show on here where that is?

A. It is a point shown on the extreme left-hand portion of the map, which has those narrow portions going trough—

Q. Where your flume line goes through—you mean the narrow portion that is an extension of the ground where the words “Alaska-Juneau Flume,” extending on out to the westward? A. Yes.

Q. Any others?

A. Yes; there were claims located along the hill-side above [225—75] Gastineau Channel, reaching from Chicken Ridge to a point rather above the Utah Claim, which is a patented claim located on the shore of Gastineau Channel.

Q. Now, that is along what rectangular figure or line on this map—were those located?

A. That would be along the upper portion of the area on the lower left-hand corner of the map and above the words “Alaska-Juneau Flume” and reaching over to a point above the words “Milling Plant” in the title “Location of the 12,000 Ton Milling Plant.”

Q. Any others?

A. It was about that time, if I remember correctly,

(Testimony of R. A. Kinzie.)

that the negotiations were opened with Mr. Reck, Mr. Shattuck, and so forth for the purchase of the Abe Lincoln, General Grant, and other claims owned by them along the shore of Gastineau Channel—either then or a little later.

Q. Those were two mining claims also that were held invalid under some proceeding in the Land Office?

A. They were afterwards, I think, held invalid.

Q. Any others? A. During the year 1910?

Q. Yes, or since then.

A. Oh, there have been a number of claims since then.

Q. That is what I am trying to get, as near as you can, all you have located since 1909, when you started to open up this property as you have testified to?

A. We have since then acquired by purchase and location all of the property shown along the north shore of Gastineau Channel, with the exception of that portion covered by the Utah and the Summit Claims; we have also acquired the right of way, as indicated by the tunnel and flume line in the lower left-hand corner; also purchased a portion of the ground included from the Pacific Coast Company; we have [226—76] located in Silver Bow Basin a number of claims, extending the boundaries of our properties, and also have purchased a number of others, patented and unpatented; we have located properties just west of the Ebner mill, and also have purchased another piece of property just southeast of the Jualpa Basin, and located the rectangular

(Testimony of R. A. Kinzie.)

piece for the purpose of driving the sea level tunnel.

Q. Since that time you have had surveyors working and getting up data for the purpose of getting up this exhibit, also?

A. Hardly for that purpose, Judge.

Q. And you have had surveys made approximately covering about all the ground from Gastineau Channel clear out to the northward, and covering over the Ebner property, the Alaska-Gastineau, and other properties up there, in order to ascertain if there were any fractions that could be located, haven't you?

A. We have had surveys run around all of our properties and in the vicinity of all our properties.

Q. Have you had it run around any one of these properties?

A. I think some of our surveys have both gone onto and over other people's property, yes, which we have a perfect right to do.

Q. And a large portion of this property out to the westward is in conflict with some other property?

A. No, not a large portion of it.

Q. Some of it?

A. Yes, some portion of that property—the upper corner there—would be in conflict, I would say.

Q. Is the property you say this is in conflict with patented or unpatented?

A. I think a portion of it is patented and a portion of it is unpatented.

Q. Now, then are you sure, Mr. Kinzie, that the survey made [227—77] by Mr. Lindsay of this

(Testimony of R. A. Kinzie.)

proposed flume line extending from the Gold Creek canyon down to near Gastineau Channel is the first work that you did with reference to opening up this property under this Gold Creek tunnel scheme?

A. Oh, no.

Q. That is not the first that was done?

A. The tunnel line had been run and brushed out in the early days by Mr. Tappan; that was done in the days of 1902 to 1904.

Q. What I mean is this, Mr. Kinzie—the first thing that you did with regard to opening up this property under the Bradley scheme determined upon in 1909—what was the first thing you did?

A. The first thing I did was to find the proper way in which to do it; that was by consulting our attorney.

Q. I mean the first active work—I want to know whether *it the* location of claims or the surveying?

A. There was a great deal of office work necessary—

Q. I want to know what was the first thing that you remember after Bradley had determined to open up this property by means of the Gold Creek tunnel, and along the lines that you are now working that you have testified to, what was done?

A. As near as I can remember it, it was that work of location, and running the preliminary line along the proposed route of flume and tramway.

Q. Was it the location or running your lines, the first work? A. Both.

Q. At the same time?

(Testimony of R. A. Kinzie.)

A. If I remember correctly they were done at the same time.

Q. What time?

A. July, 1910 or '11, somewhere in there. [228—78]

Q. You didn't locate any claims on that day, did you?

A. What date was the Bear No. 1 located on—I think it was July 11th, I am not positive as to that.

Q. From your memory you cannot tell just exactly the date when the first work was done on the ground after this Bradley scheme of opening up the property had been determined on?

A. To the best of my recollection, it was about July 11.

Q. That was what?

A. That was running of the preliminary lines from Gold Creek Canyon to Gastineau Channel and the necessary location of the proper ground to cover our rights of way.

Q. Now, then, how long prior to August 1st had Lock Mulligan been working for you?

A. I think he had been working for some time for us—I don't know the exact date he commenced.

Q. Was he ever on Gold Creek, to your knowledge, prior to the time you say you sent him up there to post the notice.

A. I don't know, I am sure.

Q. You never had him do any work up there?

A. No, I never had him do anything up there.

Q. What was he working at prior to that?

(Testimony of R. A. Kinzie.)

A. I think he had been working at the store.

Q. He went up there alone to post this notice, did he? A. My impression is that he did.

Q. How long after that was it that you found the notice?

(Not answered on account of objection.)

Q. Now, did you state in your direct examination that you afterward saw a notice posted up there by Mulligan, which was approximately where you had directed him to post it? A. I think I did, yes.

Q. Now, then, you testified in what is known as the Basin case here, I believe, Mr. Kinzie,—it was between the Ebner Gold Mining Company and the Alaska-Juneau Gold Mining Company, [229—79], which is known as No. 2155 in the Circuit Court of Appeals—you testified upon the trial of that case in this court, did you not? A. I did, yes.

Q. I will ask you in connection with this matter as to whether or not you found this notice posted approximately where you directed it to be posted, if you did not testify upon that trial as follows:

“Q. Now, Mr. Kinzie, I will ask you what you did about July or August of 1910, looking towards the appropriation and diversion of the waters of Gold Creek, what was the first steps you took in accordance with the plan outlined by you? A. Well, the first visible step on the ground was the location of the notice. Q. What, if anything, did you do before that? A. We had been on the ground—that is, I had been on the ground, and as soon as Mr. Bradley arrived, I went over the plan with him, and we de-

(Testimony of R. A. Kinzie.)

terminated the exact point where we wished to take out the water." You determined that before you sent Lock Mulligan up there, did you not?

A. Yes, sir.

Q. Another question: "Q. Who is Mr. Bradley?

A. The President and Consulting Engineer of the Alaska-Juneau Company. Q. What did you and Mr. Bradley do? A. We then determined the point at which the diversion was to be made and the location was to be made, and Mr. Mulligan was sent up to make the location." Then, isn't it a fact that before you sent Mulligan up there that you had determined the exact place on Gold Creek where you desired to locate the water?

A. The approximate point, yes.

Q. Well, you stated in your testimony on that trial that you had decided upon the exact point, did you not?

A. Well, it might be so interpreted, yes; but you cannot send [230—80] a man to an exact point on the creek—particularly a man who is not a surveyor.

Q. Approximately how far from the point where you and Bradley had determined you were going to divert the water, did you see a notice stuck up?

A. That would be pretty hard to say—it would be within 50 to 100 feet of the point.

Q. Did you tell him to post it so many feet below the compressor house of the Ebner Company?

A. Yes, I did.

Q. And he didn't post it within 50 or 100 feet of

(Testimony of R. A. Kinzie.)

the place you told him to?

A. I think he went below the point, as it was afterwards surveyed.

Q. Below what point?

A. The point he was told to go to; he was told to measure off a number of feet, starting at the new Ebner mill and going down Gold Creek; and I took the map and measured off the distance from the new Ebner mill to the lower side line of the Lotta Claim—we measured that distance and told him to go up and measure down the creek the required distance, and be sure he went far enough to keep over the end line of the Lotta.

Q. He didn't get over it, did he?

A. To the best of our knowledge, he did.

Q. But you know he didn't get over it, as the decision of Judge Cushman proved, don't you?

A. Judge Cushman has so decided the question, yes.

Q. Wouldn't that 100 feet you indicated have carried you below the present established line of the Lotta Claim, if he had followed it out?

A. No; above the Lotta.

Q. This new Ebner mill you designate in your answer isn't the [231—81] mill that Ebner had been running, but is the one they had the air-compressor in and is down in the gulch?

A. Yes, it is a building built for the 50-stamp mill.

Q. I know, but it has never been used as a stamp mill, has it—had it ever been used prior to that time as a stamp mill? A. Not to my knowledge.

(Testimony of R. A. Kinzie.)

Q. It is the building down below the 15-stamp mill, in which Ebner had an air-compressor, isn't it?

A. I don't know whether Ebner had a compressor or not; I know the building was built for a 50-stamp mill.

Q. Did Ebner ever use it, to your knowledge at all?

A. Yes, it was used at the time Mr. Thane was up there at the mill, and there was a compressor in it at that time.

Q. That was under the Ebner regime?

A. I don't know if he was operating it or a Mr. Young or Mr. Barron.

Q. When was that? A. 1903.

Q. Then it was used prior to August 1st, 1910, wasn't it?

A. They had housed a compressor in one corner of the building—that is, a water driven compressor.

Q. Do you want to be understood as testifying that they hadn't run the air-compressor to operate the Ebner property—the air-compressor in this building? A. I don't know whether they ran it or not.

Q. That is the building you have reference to?

A. That is the building, yes.

Q. Now, then, how long had Harri been working for you prior to August 1st, 1910—O. M. Harri?

A. O. M. Harri?

Q. Yes.

A. He had been working for a number of years for us.

Q. Now, just prior to August 1st, when you say you sent him [232—82] up there he had been

(Testimony of R. A. Kinzie.)

working for you, had he?

A. Yes, I think he was then working for us.

Q. Are you positive of that?

A. Yes, I am quite positive of that.

Q. That he was working for you right up to August 1st, at the time you sent him up on this property?

A. He was either working right up to that time, or very shortly before it; he had been working on the island as a watchman.

Q. Isn't it a fact he had not been working for you for a long time prior to August 1st, and you sent for him and employed him for the purpose of going up there?

A. I think Mr. Harri would be the best witness on that point; my impression is that he was working for us at that time.

Q. Make it as positive as you can—now, do you know or do you not know as to whether he had been working for you prior and up to August 1st, when you directed him to go up to this property?

A. I think he was, yes.

Q. That is as strong as you will put it?

A. That is as strong as I will put it.

Q. You won't say positively?

A. I won't say positively.

Q. At that time had Harri ever been up on this creek before? A. Not to my knowledge.

Q. Where had he been working for you prior to that time? A. In a number of places.

Q. On the other side of Gastineau Channel?

(Testimony of R. A. Kinzie.)

A. Both sides.

Q. On the property of the Alaska-Juneau Company?

A. I think not on the Alaska-Juneau property.

Q. Well, where had he worked for you on this side of the channel? [233—83] A. Sheep Creek.

Q. But you know that he had never been up on Gold Creek before that time, don't you?

A. No, I don't.

Q. You know he had never worked for you up there?

A. I am quite sure he had never worked for us up in Gold Creek canyon.

Q. I will ask you if it isn't a fact, Mr. Kinzie, when you got Harri into your place to make this arrangement with him to send him up there, that you sent him up there expressly for the purpose of ascertaining whether or not there had been any assessment work done on the Parish Claim, is that the errand that you first sent him up there on?

A. No, it is not.

Q. Isn't it a fact that you sent him up on that mission, and he came back and went up on the 1st day of August, and looked over the Parish No. 2 Claim and discovered a tunnel, came back and told you he discovered that, and found that the assessment work had been done on the Parish No. 2, and then didn't return to this property until the 3d day of August? A. You are mistaken, Judge.

Q. Isn't it a fact, Mr. Kinzie, that he did go up there on the 1st day of August, 1910? A. He did.

(Testimony of R. A. Kinzie.)

Q. That is true? A. Quite true.

Q. Isn't it a fact that he came back on the 1st and went over and reported to you and didn't go back up there until the 3d of August?

A. That is not a fact.

Q. Did you hear Harri's testimony upon the trial of the case in this court, known as the Basin case? [234—84]

A. Yes, sir; I think I have heard all of his testimony.

Q. Now, if Harri testified at that time that he went up there on the 1st and looked around and found this tunnel on the Parish No. 2 Claim, and came back and went up on the 3d, what do you say now about that? A. I know he didn't testify so.

Q. Now, then, I will ask you if you remember whether Mr. Harri testified on that trial as follows—I am referring to page 1006 of the third volume of the printed record in that case— “Q. Just state what you did when you went up there—what did you find there first? A. I went up on August 1st, and looked the claim all over as much as I could that day to see if there had been any assessment work done on it and I didn't find any; then I came down to the present location of the cabin, and cleaned out some brush there in case I sent someone up there to start the work, so they would know where to start the cabin, and started a short piece of trail up the creek. That was on August 1st. August 3d I went back to the present location of the cabin and up the creek, cut some steps up the bank.” Now, when did he

(Testimony of R. A. Kinzie.)

come back from there—did he come back and report to you?

A. The first part of the testimony I remember distinctly; jumping from August 1st to August 3d I don't remember at all, and I don't think it is a fact.

Q. You don't think he testified that way?

A. The best of my recollection is he didn't, but he went back the afternoon of the 2d.

Q. That is your memory, and you think your memory is better than the printed record on that?

A. I think my memory on that is very good, yes.

Q. What was he hunting for assessment work for—did you instruct him to hunt for assessment work on Parish No. 2? [235—85]. A. I did.

Q. Then one of his missions was to hunt for assessment work on the Parish No. 2?

A. Yes, sir; it was.

Q. When did he come and tell you about it—was it on the 2d or 3d of August?

A. I think the first time I saw Harri after he was sent over here was late on the afternoon of the 3d.

Q. Where did you see him?

A. Just above the cabin, just around the bend, above the bunk-house.

Q. You were up there on the 3d? A. I was.

Q. Mr. Kinzie, didn't you testify on the application for a preliminary injunction in this case when I cross-examined you whether it was the 3d or the 6th, that you didn't remember whether it was the 3d or the 6th?

A. I said it was either the 3d or the 6th; I think

(Testimony of R. A. Kinzie.)

it was the 6th; I have since gone into the subject very carefully, and traced out day by day, and now positively testify it was on the 3d.

Q. You testified substantially on the trial of the Basin case it was either on the 3d or the 6th, didn't you? A. I did.

Q. And you testified on the preliminary hearing that as near as you could confine it, it was on the 6th, did you not?

A. No, I said 3d or 6th, probably the 6th.

Q. You admit you used the word probably, do you?

A. Something to that effect; I don't know whether I did or not.

Q. I will ask you if you remember these questions propounded to you upon the application for the preliminary injunction in this case?

A. Was that the last one? [236—86]

Q. Yes, the last one, "and he went up there; at least you sent him up there—now, what time after that did you go up there, Mr. Kinzie? A. Well, it must have been two or three days later. Q. Now, you testified on that Basin case that you went up there on the 3d or 6th, and that you didn't remember which; didn't you? A. I very likely did. Q. Now, you say that your memory is that you went up there absolutely on the 3d? A. I will change it from the 3d to the 6th, but my recollection is the 6th—I don't remember exactly the date; I will get that date exactly—I should have done it before"—That was your testimony, wasn't it?

A. No, I don't think it was; I am quite sure I was

(Testimony of R. A. Kinzie.)

up there on the 6th, yes.

Q. Well, you don't want to be understood, then, that you answered the questions I read to you from the transcript in the manner in which I read them to you?

A. No, I don't think I answered those questions exactly the way they are reported there.

Q. You have always considered those dates material, haven't you, Mr. Kinzie? A. Very material.

Q. Now, on those two hearings—were you not positive on those two hearings that you didn't know whether it was the 3d or the 6th?

A. I think that one or two questions have been left out in there, because I was there both on the 3d and on the 6th, and I have since been able to check up day by day from the second, third, fourth, fifth, sixth and as far as the eighth.

Q. But on the other two occasions that you testified, you never before testified you were up there both on the 3d and the 6th? A. Yes, sir. [237—87]

Q. When did you testify to that?

A. In both hearings.

Q. Then you want it understood that this testimony is not your testimony?

A. Part of it is, yes.

Q. Not all of it—has part of it been left out in the record made by Hamburger, in the Basin case, that went to the Circuit Court of Appeals?

A. I don't know.

Q. You have read the printed record?

(Testimony of R. A. Kinzie.)

A. Yes, I have read that.

Q. You don't think you answered it was either the 3d or the 6th when you went up there, in that record, do you? A. I very likely answered it that way.

Q. Now, you say you went up both on the 3d and the 6th? A. Yes.

Q. You want that to stick, do you?

A. I want that to stick; yes, sir.

Q. Now, I will ask you if you didn't on the trial of the Basin case, which is the case that went to the Circuit Court of Appeals, cause No. 2155 of that court, if you remember this part of Harri's testimony about his coming down from this property on the 1st (I am reading from page 1007, which follows the answer I read to you from page 1006). "Q. At what point? A. At about where the dam is now, and I got through that day and started to come down the flume line to come to Juneau, and I saw a hole in the bank on the south side of the creek that looked like a tunnel and I went over and examined that. While I was examining the claim on the 1st, this being down right under the cliff I didn't see it, but on the 3d I saw this hole and went over and went into it." Do you remember his testifying that way about his coming down to Juneau? [238—88]

A. Coming down to Juneau?

Q. Yes.

A. That doesn't say anything about his coming down to Juneau.

Q. Now, then you testify now that you are positive you were up there on the 3d—where did you see

(Testimony of R. A. Kinzie.)

Harri up there on the 3d?

A. Just around the point, from the little flat where the bunk-house was afterwards built—between the dump in the Borean pit and the point just up stream from the present location of the bunk-house.

Q. Had you seen Harri and had any conversation with him at all between the 1st of August when you sent him up there and the time you saw him when you went up there on the 3d? A. No, I think not.

Q. Do you personally know where Harri had been on the 1st, 2d, and 3d?

A. Did I follow him up all the time to find out?

Q. Yes. A. No.

Q. Now, when you got up there on the 3d, you found him in about the locality that this bunk-house is built, that the photograph, I think you used shows—what claim is that bunk-house on?

A. It is on the Oregon claim.

Q. On the Datson or the Corbus? A. Both.

Q. And if there isn't any Oregon Claim, what claim is it on? A. The El Oro Placer.

Q. Who owns that placer?

A. The Alaska-Juneau Company.

Q. When did you locate it?

A. That was located this spring.

Q. Don't you know that placer is on what is known as the Cape Horn No. 1? [239—89]

A. I don't know whether it is or not; I know there is such a claim up there.

Q. Did you ever run out the boundary lines of that claim? A. No.

(Testimony of R. A. Kinzie.)

Q. If there is such a claim as the Cape Horn No. 1, you say you don't know where the boundary lines of the Cape Horn No. 1 are? A. No.

Q. What was he doing up there that day?

A. Going down the creek in the direction of the upper part of the creek.

Q. Going down towards the cabin?

A. No; he was above the cabin going down in the direction of the Borean dump.

Q. And on these three days there had been nobody up there where Harri had been working?

A. I am not sure about that; I don't want to testify that there was—my impression is—

Q. I don't want your impression—do you know whether or not there was anybody there with Harri?

A. I am not positive.

Q. Don't you know that there was not anybody up there? A. No, I do not; I—

Q. Are you positive there was not anybody up there?

A. No; I am not—if I was I would say so.

Q. Harri would know whether there was or not, wouldn't he? A. Harri would know.

Q. You didn't send anybody else up there with him? A. Yes, I did.

Q. Who?

A. I sent Summers up to show Harri the place he was to go to work on.

Q. When was that?

A. On August 1st, 1910. [240—90]

Q. Haven't you testified that he went up there

(Testimony of R. A. Kinzie.)

alone, Mr. Kinzie? A. No, I didn't.

Q. Who is Summers?

A. Summers is employed by the Alaska Treadwell Gold Mining Company.

—Q. Is he in their employ now? A. Yes.

Q. Is he a surveyor? A. He is not.

Q. Had he ever been up on Gold Creek before that time? A. Yes.

Q. How much work had he done over there?

A. I don't know that he did any work over there.

Q. Summers had not done any work up there when Harri was sent up there? A. No.

Q. Now, what work did you find was done there on the 3d—just explain it as minutely as you can, Mr. Kinzie.

A. The work that was done was the brushing out of the trails from the Jualpa dam to a point just below the Gold Creek tunnel.

Q. That trail commences somewhere near the place—that dam is still standing?

A. The Jualpa dam?

Q. Yes, part of it.

A. Yes, the dam is still standing.

Q. Now, then, this trail extended up to the point where he was going to build a bunk-house, didn't it?

A. No, it didn't; the trail extended up the left-hand side of the creek to a point just below where the tunnel has been driven.

Q. How much had he done in those three days?

A. The brush was out of the trail; the basin road used to go up [241—91] on that side, and he

(Testimony of R. A. Kinzie.)

brushed out that road.

Q. The first thing that Harri did then was to get a trail up to where the house was to be built?

A. I don't know what the first thing he did was, I wasn't there.

Q. Did he have any trail built from the Jualpa flume up to where the house was to be built?

A. Yes.

Q. He had that completed? A. No.

Q. How much work had he done on it—what part of the distance? A. This trail—

Q. This trail he had cleaned out which led from the Jualpa dam to where the cabin was afterwards constructed?

A. The first part running to a point just below the Gold Creek tunnel.

Q. My question is, that part of this trail you discovered he had made—didn't this trail lead up to where you afterwards put the cabin? A. Yes.

Q. For what purpose was it built?

A. It was necessary to brush it out to get lumber, tools and so forth up to where the house was to be built.

Q. The first thing they cleaned out was the trail to get the lumber up to the building?

A. I didn't say that; I say that this is one of the first things I found that he did.

Q. What portion had he cleaned out at that time?

A. I suppose 150, 200 or 250 feet, that is the old Basin trail.

(Testimony of R. A. Kinzie.)

Q. In these three days what else had he done, that you saw?

A. He brushed out where the house was built—brushed out for it; cleaned away some rocks and stuff at the lower end of the [242—92] bluff just below where the bunk-house now stands; a trail made along to the end of the Borean pit, and across the pit they placed a plank.

Q. Was that all you saw?

A. That was all I saw, yes.

Q. Now, then, how far away from where you afterward constructed your dam was this work that Harri had done between the 1st and 3d of August, 1910?

A. The first part of the trail started at a point I should say 1500 or 1600 feet away from our dam and led up, as far as I went that day to a point within four or five hundred feet—350 or 400 feet of it.

Q. The trail commenced down near the Jualpa dam? A. Yes, sir.

Q. How far is that from the Alaska-Juneau Dam?

A. 1500 to 1600 feet.

Q. 1500 to 1600 feet?

A. I should say about that, maybe not quite that far.

Q. And then the end of the trail that had been cleaned out would be about how far from where you started?

A. I should say 350 to 400 feet, as far as I went that day.

Q. It wouldn't be any further than that?

(Testimony of R. A. Kinzie.)

A. I think any of the photographs show it very well.

Q. They don't show the distances, Mr. Kinzie?

A. Yes, they do; they show the trail and they show the dam, and they show the cabin—

Q. I know, but the photograph is not made on any scale—I want the actual distance.

Q. You can get the distance as close as I can give it to you—it would be 350 to 400 feet.

Q. Can you stand at the end of the works up the creek and look up the creek and see the place where your dam is constructed? [243—93]

A. Just state that question again.

Q. Can you stand on the end of this work that Harri had done from the 1st to the 3d—I mean the end up the creek and see up the creek to the place where your dam is constructed?

A. In the first place, I didn't say that was the end of the work he did—I said that was the end of the work I saw; in the second place I think you can—I think you can see the falls and the dam from the end where I was.

Q. Are you positive of that?

A. Yes, I am quite positive.

Q. Have you ever done that, Mr. Kinzie?

A. Not from that particular place.

Q. You wouldn't positively say that you can, would you? A. No.

Q. Now, taking the lower side line of the Lotta Claim, where your dam is constructed, how far can you see down the creek from the left-hand bank from

(Testimony of R. A. Kinzie.)

any point along the lower side line of the Lotta?

A. From the what?

Q. The lower side line of the Lotta, where your dam was constructed, along the lower side line, what is the furthest distance you can see up the creek from the left-hand bank?

A. You can see down as far as at least the Borean dump; I think you can see as far down as where the tunnel starts.

Q. You think the contour of the creek and the bank is such that you could do that? A. Yes.

Q. Can you see, from the left-hand side of the creek all along where your flume line is constructed from the last point I have mentioned?

A. There might be a portion of the flume where it goes around a point on the cliff that you cannot see, but the entire distance from the point where it commences—the flume—at the dam [244—94] up to where it enters the Borean pit can be seen.

Q. You are positive of that?

A. Yes, if you care to I will show you the scene from the picture—the photograph.

Q. I want what your memory is, from your actual eyesight. A. Yes.

Q. You are sure of that? A. Yes.

Q. Now, then, Mr. Kinzie, when was it after the 1st of August that you knew that anybody was up there assisting Harri in the building of the cabin?

A. Positively?

Q. Yes, sir. A. That was on the 6th.

Q. 6th of August?

(Testimony of R. A. Kinzie.)

A. Yes, late in the afternoon.

Q. You were up there on the 6th? A. Yes, sir.

Q. Who was helping him?

A. This man named Burg; there were two Indians; a man named Burg—I have since found out what his name was—Burg; and a one-eyed man, to the best of my impression it was Dempsey, the carpenter.

Q. You were hauling lumber up the creek at that time, and dumping it off at the old Jualpa dam, and then it was carried by the men up over this trail you have spoken about up to the place where the cabin was built?

A. The lumber, I think, was hauled up on the 4th or 5th; I wasn't there; the lumber was ordered on the 2d.

Q. You don't know of your own knowledge it was delivered on the 4th or 5th?

A. Simply by the records on file.

Q. You gathered that from somebody's else's entries, did you? [245—95]

A. Yes; there was lumber on the ground that day; I cannot say whether it was all the lumber or not; it had been packed up the trail and dumped at Snow Slide Gulch.

Q. How long had they been hauling lumber up there, Mr. Kinzie?

A. Of my own knowledge, I know nothing more about it than the records show.

Q. You don't know of your own knowledge how long they were hauling lumber up there to build the cabin?

(Testimony of R. A. Kinzie.)

A. No, I didn't see them hauling the lumber.

Q. After you built the cabin you built a blacksmith-shop, didn't you? A. Yes.

Q. Covered with a tent?

A. At first it was a lean-to fly.

Q. Was that lumber hauled up at the same time that lumber was taken up for the cabin?

A. No, there was very little lumber hauled up there at the beginning.

Q. You don't know, of your own personal knowledge, when that house and blacksmith-shop were completed, do you?

A. I know approximately when they were completed; I was up there every two or three days after that.

Q. What do you say approximately?

A. I should say along the 10th or 11th, somewhere in there.

Q. Would it be as late as the 13th of August?

A. No, I don't think it was that late.

Q. Well, you would be in a position to know that, wouldn't you?

A. The record in the case is a great deal more accurate than my memory.

Q. You mean entries made by somebody else?

A. I mean time books and entries made by the men who were working on the job. [246—96]

Q. You haven't heard their testimony?

A. I know what they say about it.

Q. They haven't testified in court—none of them, but Harri? A. No, I don't think they have.

(Testimony of R. A. Kinzie.)

Q. Now, then, up to the time that this house was completed there wasn't anybody up there assisting Harri in his work, was there? A. Yes.

Q. Assisting Harri in doing what?

A. They were working around the house, packing lumber and helping on the construction of the trails, and so forth.

Q. Who helped with the construction of those trails besides Harri up to the 12th or 13th, when this cabin was built?

A. You will have to segregate your question a little bit, Judge; if you want to know if I actually saw that, I will have to answer it that I don't know.

Q. Well, I want to know, Mr. Kinzie, whether there was anybody assisting Harri on this trail work until after this house was completed?

A. You want to know—

Q. Yes, of your own personal knowledge.

A. No, sir; I wasn't there; I know what the record shows, and what the record shows is all I know about it.

Q. I am asking, Mr. Kinzie, of your own knowledge.

A. No, sir; I didn't see them cutting any trails.

Q. Isn't it a fact that nobody ever assisted Harri in building trails after that house was built except the trail that led up to the house?

A. I believe that is Harri's testimony—that is all I know about it.

Q. If Harri testified that way you have no reason to doubt it?

(Testimony of R. A. Kinzie.)

A. No reason to doubt it, if he testified to it.
[247—97]

Q. Now, then, Mr. Kinzie, Mr. Lindsay was a surveyor in your employ at that time, was he not?

A. He was.

Q. Do you know when Mr. Lindsay first went up there to make any survey of any intended flume line of the Alaska-Juneau Company?

A. Do I know when he first went up?

Q. Yes. A. No, I don't.

Q. Do you know that Mr. Lindsay didn't go up there to make a survey of any flume line until the 12th day of September, 1910?

A. I know the contrary, that he did.

Q. Did you hear Mr. Lindsay's testimony on the trial of this case for a preliminary injunction?

A. I did.

Q. Don't you know that Mr. Lindsay never made any survey for any flume line until the 12th of September, 1910?

A. I know on the contrary that he did; you are speaking of one piece of flume and I am speaking about another piece of flume.

Q. Isn't it a fact that the first surveying that Mr. Lindsay did up there was to go up there and lay out the upper tunnel which you had intended to put the flume line on and that was on the 12th day of September, 1910?

A. No, it isn't so—your question compelled me to answer that way.

Q. Do you know that of your own personal knowl-

(Testimony of R. A. Kinzie.)

edge? A. No, I know what Mr. Lindsay said.

Q. Do you remember Mr. Lindsay's testimony in this case, that he said he went up there on the 12th day of September and surveyed out the upper tunnel, and that Hendrickson and some men went up there and commenced that work?

A. I remember that testimony, yes, sir; that doesn't mean anything. [248—98]

Q. Now, I will ask you if this is his testimony—you know Mr. Lindsay was in your employ—"You were employed to go up there and instructed to go up there and locate a flume grade? A. I was. Q. When did you do this? A. I believe the first survey was made on September 12th for the flume."

A. What do you mean by there?

(Objected to as not cross-examination.)

Q. Then, as I understand, Mr. Kinzie, you swear positively that there was a survey made up there for a flume line looking towards taking the water out of Gold Creek after the 1st of August, 1910, and that such a survey was made before the 12th day of September, 1910; is that true? A. That is quite true.

Q. Who made it? A. Lindsay.

Q. Where did he make it?

A. Made it from the mouth of Gold Creek tunnel to a point on Gastineau Channel on the Utah Claim.

Q. I am talking about the other tunnel up there—was there ever any survey made by Mr. Lindsay or by anyone else of any flume line leading from Snow Slide gulch or where your air-compressor is to where your dam is constructed, prior to September 12,

(Testimony of R. A. Kinzie.)

1910? A. There was.

Q. Who made that?

A. I don't know—that is what I am trying to find out; the stakes were in there at the time they had this flume started and that was long before September 12th.

Q. And during all the time this case has been pending you have'n't been able to find out who made the survey up there?

A. No, I haven't been asked for it, and I didn't find it.

Q. You know Lindsay did make a survey up there on the 12th, do you not? [249—99]

A. Judge, if you want me to answer these questions, I will do it, but one minute you want me to answer a question one way and the next minute another.

Q. Did you send Lindsay up there on the 12th to make a survey?

A. I don't remember whether I did or not.

Q. Don't you know, Mr. Kinzie, that on the 12th he did go up there to make a survey, and on the 12th he made a survey so it would take the water out of Gold Creek above Snow Slide gulch at some point and bring it through the tunnel, that is, some 10 to 16 feet higher up the hill than where your tunnel was ultimately constructed, through which you put your flume?

A. I know in our office there is a set of notes supposed to be taken by Lindsay in a survey on or about the 12th of September, but I don't know—I wasn't on the ground and know nothing more about it; I am

(Testimony of R. A. Kinzie.)

sure the testimony will show—

Q. Just answer my questions, Mr. Kinzie.

A. Of my own personal knowledge, I don't know; I wasn't on the ground when the survey was made.

Q. You do know this, Mr. Kinzie, from what you have seen on the ground, that there was an upper tunnel started and driven in some 10 or 15 feet?

A. Yes.

Q. Which, if it had been graded off for a flume, would have taken the water out of Gold Creek at a higher point than it is now taken? A. Yes, sir.

Q. Don't you know also that a line was run pursuant to this upper tunnel and grade line, run clear on up Gold Creek to where you intended to take out the water, at the same time?

A. Not that I know of. [250—100]

Q. Of course, you were not up there when Mr. Lindsay made the survey?

A. In fact I don't believe the survey at that time was for the upper tunnel; I think it was the lower tunnel.

Q. Now, Mr. Kinzie, I will refresh your memory, if I can—don't you know that Mr. Lindsay testified in your presence that on the 12th day of September he made this survey for the flume line and grade for the upper tunnel, and then about a week after that he made a survey which would carry your flume line along the present grade?

A. I don't remember that.

Q. You don't remember that? A. No, I don't.

(Testimony of R. A. Kinzie.)

Q. You do know that upper tunnel was started, don't you?

A. I know I started the upper tunnel myself.

Q. Who did you have up there at work on it, Mr. Kinzie? A. Fins.

Q. Do you remember their names?

A. Yes; Hendrickson was one, Henry Hendrickson, and another one by the name of—I cannot think of his name.

Q. What date was that, Mr. Kinzie?

A. That was, I think, in the latter part of August; I don't remember the exact date.

Q. I will ask you, to refresh your memory, if you didn't testify before in the Basin case that that was about the 5th day of September that Hendrickson went to work?

A. That was a different thing; on the 10th day of September a contract was let to him for the work.

Q. They would not have been put to work on the upper tunnel before the survey was made, would they? A. No. [251—101]

Q. Don't you know that Lindsay surveyed the flume line for that upper tunnel? A. No, I don't.

Q. Now, I will refresh your memory on that—didn't Mr. Lindsay testify upon the preliminary hearing that he did make the survey for that upper flume line, and they worked on that upper tunnel about a week, and then he went and made the other survey, don't you remember that? A. No, I don't.

Q. Were you up on the ground with Hendrickson and his people any more than the one time?

(Testimony of R. A. Kinzie.)

A. I was up there a number of times.

Q. When were you up there first?

A. The latter part of August.

Q. Are you sure of that? A. Yes.

Q. Can you give the date? A. No.

Q. And you say Hendrickson went to work on the tunnel up there in the latter part of August?

A. They were up there on the ground every day from at least the 15th and did some work; in the latter part of August they then started work, and on the 10th day of September a contract was signed between Hendrickson and the Alaska-Juneau Gold Mining Company.

Q. Hendrickson had a contract to run the tunnel?

A. After the 10th of September, yes.

Q. Had he done any work on the tunnel before the 10th of September? A. Yes.

Q. But you cannot fix the date?

A. The exact date when he first went to work there?

Q. Yes. [252—102]

A. No, I cannot; it was on a Sunday, that is as close as I can come to it, when he first went up, because I went up with him.

Q. Now, I will ask you, Mr. Kinzie, if you didn't testify as follows in the court upon the trial known as the Basin case, being 2155 of the Circuit Court of Appeals, the Ebner Gold Mining Company vs. The Alaska-Juneau Gold Mining Company, and the part I read to you is from the printed record of testimony in that case, found in Volume 3, page 921—"Q. I

(Testimony of R. A. Kinzie.)

understand you had Harri up there from sometime about the 1st of August up to some other specific date, before you put anybody there to assist him. Now, leaving out the question of those men who assisted him in building the house or built the house or assisted Harri in getting the lumber to where the house was built—leaving them out of the question, I wish you would fix the date specifically when it was you sent another men up there to help Harri? A. I went on the ground with Hendrickson on September 10th. Q. Hendrickson was the man who took the contract to build the tunnel you expected to put through there at Snow Slide gulch to put your flume through? A. Yes, the contract was afterwards signed up. Q. When you went up there on the 10th—that was the first work you had done outside of what Harri done? A. Yes, sir—that is, on the flume”—didn't you testify that way on that other trial, Mr. Kinzie?

A. I very likely did, and it is more or less true—the contract was signed on September 10th.

Q. Now, I will ask you if you don't also testify upon that trial—in this same volume, at page 908 as follows: “Q. After this cabin that Harri occupied down near Snow Slide gulch was built—not considering the men who assisted in building that cabin but what other men besides Harri did [253—103] you have working up there along about the 1st of August, if any? A. There were no other men. Q. When did you put on any other men up there to assist Harri? A. I think it was September 10th. Q.

(Testimony of R. A. Kinzie.)

Do you know how many men you put on there? A. It was either two or three men—it was a contract started at the time. Q. Two or three men on September 10th? A. Yes. Q. Who were they? A. Hendrickson was one—the contract was let to Hendrickson. Q. What was that contract? A. Driving a tunnel.”—Did you testify to that?

A. I very likely did, but—

Q. I don’t wish any explanations, I asked if you testified that way. You say you were up there quite frequently during the progress of this work—I will ask if you know how long Hendrickson and his people worked on that upper tunnel?

A. They worked until sometime in 1913—1912—I think 1912.

Q. You mean the upper tunnel that was intended to carry your flume through? A. Yes.

Q. That is one of the portals or entrances to your big tunnel, is it? A. No.

Q. You continued the driving of that tunnel, did you? A. Yes, sir.

Q. What was the purpose of that, Mr. Kinzie?

A. To carry the water through.

Q. The upper tunnel?

A. Yes, the water tunnel, by which the water is carried through.

Q. You didn’t carry your water through the upper tunnel—you lowered your tunnel, didn’t you?

A. You mean the tunnel that was started right above the present one?

Q. Yes, is it completed? [254—104]

(Testimony of R. A. Kinzie.)

A. No, that is not completed.

Q. Do you know how long they worked on there?

A. Worked on there I should say 10 or 12 days.

Q. Then they came down to work on the lower tunnel that you ultimately put that flume through?

A. Yes.

Q. And it took some time to put that tunnel through, didn't it? A. It took a couple of years.

Q. And before you got that completed you ran your flume around the contour line of the creek, and didn't put it under cover?

A. No, that was done in the fall of 1910.

Q. How many shifts did you have at work on that tunnel along in August, 1910, Mr. Kinzie, or when you commenced it—when you first commenced the lower tunnel?

A. When they first commenced the tunnel we only worked one shift; after the contractors left we worked two shifts.

Q. Did you commence constructing your grade for your flume line, after you ultimately decided upon what grade you would construct it—did you commence constructing it from both ends—that is, up where your dam was and down at this end where you were running the tunnel?

A. The grade was first built from the tunnel around to the cliff, and that crew was put to work on the rock cliff; we made several attempts during the month of September to go down and start work on the flume, but were prevented from doing so by men above rolling down rocks and dynamiting, and

(Testimony of R. A. Kinzie.)

it wasn't until October 3d that any rock work was done, a trench cut out, and a flume put in on the evening of October 3, 1910.

Q. You evidently had notice that someone thought you were on their ground?

A. Very strenuous notice.

Q. I will ask you, Mr. Kinzie, as to where you unloaded your lumber you used for the two first boxes that you claim you [255—105] put in Gold Creek on the 3d of October, 1910?

A. We had lumber at two places; some lumber was unloaded at Cape Horn, and then we had some lumber down at Jualpa dam; I don't know whether it was packed down from the Jualpa dam or taken down the hill.

Q. Do you remember, Mr. Kinzie, of a fence being constructed across, partly on the Lotta Lode Claim and partly on what was contended as the Parish Lode Claim, on the boundary line? A. Whereabouts?

Q. On the Basin road.

A. You mean the road that branches off from the Basin road and runs to the New Mill?

Q. New Mill—what do you refer to?

A. To the large building in Gold Creek Canyon built by Ebner.

Q. That is the one you contend was built by him?

A. I know it was built by him.

Q. Because he told you so? A. Yes, sir.

Q. It is commonly referred to as the Air-compressor Plant, isn't it? A. No.

Q. No ore was ever milled in it, was there?

(Testimony of R. A. Kinzie.)

A. There can be a mill without any ore being milled in it.

Q. There was no ore milled in it. Now, to go back—I asked you if you remember that a fence—some sort of a fence was constructed alongside of the main Basin road that runs on the left side of the creek, and that fence was constructed at the point that leads from the Basin road down to this building in the gulch—you remember when that fence was placed there, don't you?

A. The road was fenced in, and a gate put on it.
[256—106]

Q. Do you remember when that was done?

A. No, I don't—I remember the fence was there.

Q. You remember it was there at least as late as the 10th day of October, 1910, don't you?

A. I cannot place any dates.

Q. You know it was there before the 3d day of October—the date of the diversion?

A. I think it was.

Q. And don't you remember you met with resistance about putting your lumber on what is partly the Lotta and partly the Parish?

A. No, not that I remember of.

Q. Do you remember a young man by the name of Radel? A. Yes, I think I do.

Q. Do you remember a man named Hunsaker who was out there at the time? A. I do.

Q. Don't you remember a notice that was posted on there claiming that the Lotta and the Parish were private properties and warning people to keep off?

(Testimony of R. A. Kinzie.)

A. No, I think the warning said that was a private road.

Q. A private road? A. Yes, sir.

Q. It was a private road, wasn't it?

A. It was built by individuals, and was not a public road as far as I know.

Q. Part of that road was on the Lotta patented claim, wasn't it?

A. I think the lower part was within the lower boundaries as they afterwards decided to be the Lotta claim.

Q. It was on the Lotta claim, wasn't it?

A. Yes.

Q. You say while you were present you never met with any resistance about putting your lumber down that road to build this flume? [257—107]

A. I don't remember of any resistance when I was present, or at any other time.

Q. Of course, I am asking about when you were there? A. No.

Q. You remember seeing a notice, don't you?

A. Yes, I remember seeing a notice.

Q. You did take your lumber down over that road, part of it to build those boxes?

A. No, I think not, because the boxes were built on October 3d, and the lumber was taken down the trail from Cape Horn, but I really—

Q. I will ask you if you know whether or not at any time while you were present any lumber was unloaded at that point and carried down over this road, over the Lotta and Parish claims to where you

(Testimony of R. A. Kinzie.)

were constructing the dam?

A. No, it never was.

Q. While you were present? A. No.

Q. Do you want to state to the Court that there never was any lumber unloaded at that point and carried down this road to somewhere in the neighborhood where you afterwards constructed the dam?

A. I wouldn't be able to testify to that.

Q. You don't say there wasn't?

A. No, we had logs and everything piled all the way along there from Cape Horn to our dam.

Q. Did you have any along this point I indicated?

A. No, that is quite a distance up the road from where we had our lumber—it is several hundred feet.

Q. You don't want to testify positively, Mr. Kinzie, that there wasn't any lumber or timber unloaded at the point I have indicated and carried down this road?

A. No, I don't know whether there was or not.
[258—108]

Q. Now, when was the first time prior to the 3d of August, 1910, that you met with any resistance by the Ebner people in doing anything that you were doing up there?

A. That was the latter part of September.

Q. Do you remember the date? A. No.

Q. Where was the first resistance you met with?

A. Right opposite—right above where the dam was afterwards built.

Q. Right above? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. What resistance did you meet with there?

A. Rolling rocks down the hill, and blasting on the opposite hillside.

Q. And if they were rolling rocks down the hill, they were rolling them down the hill on the Lotta patented claim, weren't they?

A. They started going over the Lotta onto other ground.

Q. They were working though—the men were up on the Lotta claim, were they not?

A. The men who were rolling them over the hill were on the Lotta and also around on the Parish claim.

Q. That was sometime in the latter part of September, probably the 23d or 24th, or along there?

A. I have the date in my record, but of my own knowledge I could not say.

Q. Do you remember, Mr. Kinzie, any particular person you saw up there on that day that was resisting your efforts up there to do the work that you say you were doing?

A. No;—the date that I remember seeing the men was October 3d.

Q. The men who were doing it prior to that time you don't know?

A. Yes, I know who there were.

Q. Were you up there at the time Hunsaker, who was then the [259—109] keeper of the Ebner property, came out and ordered you men off the ground, sometime in the latter part of September—were you present then? A. No, I was not.

(Testimony of R. A. Kinzie.)

Q. Were you present along about that time when Hunsaker, together with Fred Radel, ordered you off the ground, or your people?

A. On October 3d?

Q. You were not present at any time they ordered you off the ground prior to October 3d?

A. No, not that I remember; they were on the Lotta Claim on October 3d, and they told us to get off; we were going up to see who was doing the blasting.

Q. What time on October 3d?

A. The morning of October 3d.

Q. Who did you see up there?

A. Al Black, Middleton and Hunsaker.

Q. Who were they working for?

A. At the time they were not working at all; they had filled the side of the hill with holes—puncturing the ground to stick dynamite into.

Q. Over on the Lotta Claim?

A. The Lotta Claim.

Q. And that is the day that you came down and swore out warrants against some of the parties?

A. I think it was that day.

Q. Do you remember who you had arrested that day? A. I remember some of them, yes.

Q. Who were they?

A. There was Al Black, I think Hunsaker, Mackey—I don't remember who they were now.

Q. You had what appeared to be the leaders arrested, didn't you? [260—110] A. Yes, sir.

Q. Then they were brought down town in the cus-

(Testimony of R. A. Kinzie.)

tody of the marshal, were they not?

A. Yes, I suppose they were, or they were sent for and came down themselves—I don't know which it was.

Q. And while these people were down here in the custody of the marshal, late on the evening of the 3d, you went up and got what was your first diversion from Gold Creek?

A. I don't think you can put it that way at all; they came down and gave bail, and went out again.

Q. Where was Mackay, Al Black, and these other men at the time you got your diversion?

A. I haven't the least idea.

Q. Were you up there when you got the diversion?

A. I was.

Q. What time in the evening did you get the diversion? A. I should say about 8 o'clock.

Q. Do you remember what time the marshal went up and brought down Mackay and the others?

A. Three or four o'clock in the afternoon, I should say it was.

Q. You didn't see them any more that day, did you?

A. Not that evening, but there was somebody there; I don't know who it was.

Q. How many men did you have at work up there on the evening of October 3d when you claim you put these two boxes in Gold Creek and got your diversion of water?

A. Oh, I should say there were eight to ten men.

Q. Do you remember the names?

(Testimony of R. A. Kinzie.)

A. I can get the names for you if you want them; we have the names; Hendrickson was in charge of the crew, and Arthur Kruner—I don't remember the names.

Q. Those that you have mentioned, are still in your employ now, are they?

A. Hendrickson is not, no. [261—111]

Q. How many of them are in your employ now?

A. Oh, three or four of them that were there at that time.

Q. You claim that you constructed a dam there, do you? A. No.

Q. Well, what did you do then?

A. We had the material for the box—and had it ready for the first one or two boxes, as we had the brush cut and the boards ready, and during the day time we put in the tow logs across the creek; that evening we put in the brush, longwise, and put a stone on top of the brush; we blasted and cleaned out a channel next to the left-hand bank of the stream—cut it down, so that the water would pass through the first length of the flume full capacity; then we put the flume in, bolted it down, and put in poles to hold the flume down.

Q. How long a piece of flume did you put in?

A. I don't remember the length of that flume—16 to 18 feet.

Q. The water ran in the flume at one end and ran out of the other end into the creek, did it?

A. Yes.

(Testimony of R. A. Kinzie.)

Q. How many logs did you say you put across the stream? A. Four or five logs.

Q. Are you sure of that? A. Yes.

Q. And the logging was put down long ways, the brush was placed in front of that, a rock piled in front of the brush to raise the water and throw it over on the left-hand side of the creek? A. Yes.

Q. While you were doing that, did you see any of the Ebner people around there?

A. There was someone up on the hillside, I didn't see who they [262—112] were.

Q. Did you let that piece of flume remain in there?

A. Yes.

Q. That is a part of your dam as you afterwards constructed it?

A. It was shattered the next night, and we reconstructed it immediately.

Q. What do you mean by the next night?

A. On the night of October 3d someone put men to work up above blasting rocks and boulders down up the dam and flume as we had placed it in the canyon and crushed in the upper part of the flume and broke out the sides; the condition of the flume that morning is shown by the photograph introduced this morning.

Q. You were up there on the next morning, on the 4th, were you? A. I was.

Q. Now, then, Mr. Kinzie, where was that flume put in at that time with reference to where your dam is now constructed?

A. Exactly the same place—the identical place.

(Testimony of R. A. Kinzie.)

Q. You know that flume you put in there, Mr. Kinzie, was between 50 and 55 feet up the creek, that you put in there that night?

A. I know exactly to the contrary, that the flume as put in to-day is exactly the same place it was put in on October 3d.

Q. The flume to-day runs out and carries the water over the ground— A. I mean the intake.

Q. You mean the intake is just exactly where it was on October 3d? A. Yes.

Q. Don't you know that each of your dams, Mr. Kinzie,—that you ultimately constructed, and that you constructed at the time this basin case was brought, that part of your dam was on the Lotta patented claim?

A. I know to the contrary, as the photograph in evidence will show the conditions of it on October 4th, that the dam is [263—113] in the identical place that it was placed on the evening of October 3d, 1910.

Q. How do you account for this, then—you know that Judge Cushman, in his decision in this case, said you should be ejected from the Lotta Claim?

A. There was a portion of the filling on the right-hand side of Gold Creek that projected over the side of the Lotta and we were ordered to remove that and we have done it. The logs had been placed across the creek, and on the right-hand side of the creek—the intake was on the right-hand side—we filled in with rock so that the water would come and strike them and be thrown over on our intake, and the fill-

(Testimony of R. A. Kinzie.)

ing in front of the logs projected over the side line of the Lotta; that is on the extreme right-hand side of the creek.

Q. Don't you know that some of the ends of your logs that constituted your dam had projected over on to the Lotta patented claim?

A. No, I think not.

Q. You wouldn't be sure of that?

A. Yes, I know exactly where the line ran.

Q. If an actual survey of it would show, that it did, what would you think of that?

A. An actual survey of it would not show that it did.

Q. Did you ever survey it? A. Personally?

Q. Yes. A. No.

Q. And the other part you say you did remove?

A. Yes, simply the filling in there, and we have built on that right-hand side a more substantial structure, but on the left-hand side we couldn't go any further because we were right on the side of the falls, and it would be impossible to go any further down; the photograph will show that very [264—114] clearly.

Q. How far, Mr. Kinzie, where you saw that notice which you have testified to that it is claimed Mulligan posted—some kind of a notice—how far was that above your dam that you ultimately constructed as it is now?

A. Oh, it was quite a ways above the present dam.

Q. Following the contour of the creek, how far would you say that the cabin that Harri built, or

(Testimony of R. A. Kinzie.)

that was built, by his assistants, is from where your present dam is, as near as you can follow the contour of the creek, and then I will ask you on a straight line.

A. I can measure it on that map, do you want it measured?

Q. Yes, on a straight line from the cabin that Harri built, providing that map is correct, how far is it on a straight line from where your dam is?

A. That would be 800 feet.

Q. Following the contour of the creek it would be more, wouldn't it?

A. Something greater.

Q. Harri's cabin cannot be seen from where your dam is constructed, standing on the dam?

A. I think not; that is my impression, it cannot.

The COURT.—Is the scale on that map?

Judge WINN.—Yes, the scale is 200 feet to the inch.

Q. Now, at the time that you put this dam in, Mr. Kinzie, or attempted to put it in, or the work that you did on the 3d day of October—taking that as the starting point, how far down the creek on the left-hand bank was it before you struck any grade that you had completed on your flume line?

A. About 150 feet, maybe not quite that far; yes, I think it is that far. [265—115]

Q. Didn't you testify before it was 300 feet?

A. From the dam?

Q. Yes, sir; I want to know what you testified to before.

(Testimony of R. A. Kinzie.)

A. One hundred and fifty to two hundred feet, somewhere around there; I don't remember exactly.

Q. Do you remember or do you not remember, Mr. Kinzie, that you testified before that you thought it was 300 feet?

A. I don't remember what I testified to before—it is approximately in there.

Q. Over that *spce*, what, if anything, had been done at the time you claim to have made a diversion of the water?

A. We had started the grade, and the rock on the upper part—

Q. I mean from your dam, where you claim that you put it in on the 3d of October, on the left-hand bank, how far was it before you struck any grade—you have given that; now, over that same piece of grade had you done any work at all?

A. Yes, we had started cutting out a bench on the lower part, and on October 3d we started cutting out the upper part.

Q. I mean prior to October 3d?

A. The work had been started on the lower part, but not on the upper part.

Q. Now, this work that was being done on that grade, how far was that from where you put in your flume on October 3d?

A. I should say from 25 to 30 feet, maybe a little more.

Q. Did some work within twenty feet of your dam, on the 3d of October?

A. We built these and drilled some holes.

(Testimony of R. A. Kinzie.)

Q. Before the work, what did you do?

A. No work at all.

Q. After you left the dam, how far was it before any work had been done?

A. At the lower side they had started cutting out the rock work [266—116] from the direction of the tunnel.

Q. What do you mean, you mean on the lower end of the 300 feet or the 250 feet or the 150 feet of rock cliff that there were men working upstream and men working downstream, and also men working on the grade? A. Yes.

Q. Prior to the 3d day of October?

A. Prior to the 3d day of October.

Q. How far away down the creek from where you were endeavoring to get your diversion or did get your diversion that you claim, leaving out right around the dam, was it before you struck any work that had been done looking forward to the building of your flume line?

A. 150 feet or 200 feet, something like that; here is the photograph here that shows the distance exactly.

Q. Well, you made it a little closer than that in your answer in the other case,—didn't you state this: "Q. How far down was it from your flume, down the present grade of the flume that you had any grade ready to lay your flume on on the morning of the 3d? A. Well, the first spot that was graded, that was entirely finished, I should say would be perhaps 300 feet, maybe a little less."

(Testimony of R. A. Kinzie.)

That is in addition to that that was entirely finished? Did that 300 feet have any work done upon it? A. Yes, sir.

Q. When did you have that done?

A. They were working on it along the latter part of September, I remember.

Q. Could that grade, or where that work you contend was being done, or was done, could that spot be seen from the lower side line of the Lotta Claim?

A. I rather doubt it; from the lower side line of the Lotta? [267—117]

Q. Yes. A. No.

Q. That work could not be seen from the lower side line of the Lotta claim?

A. No, that was entirely off the Lotta claim; the Lotta claim was way up the hill from that.

Q. The Lotta claim crosses the creek, don't it?

A. Yes, sir.

Q. Now, I want to know whether or not any part of the work you said was done down 300 feet or 150 feet from your dam—whether or not that could be seen from any point along the Lotta claim?

A. Yes, I think it could; I think it could be seen from the bank of Gold Creek.

Q. If it could be seen, you think it could be seen from a point near the Basin road?

A. No, on the bank of Gold Creek just above the Alaska-Juneau dam.

Q. From the left bank? A. No, on the right.

Q. I mean by left the left-hand side going down the creek? A. So do I.

(Testimony of R. A. Kinzie.)

Q. What did you send Summers up with Harri for, on the 1st day of August?

A. Show Harri where to go.

Q. To show him where the boundary lines of the Oregon claim were? A. He showed him that.

Q. That was one of your purposes in sending him, wasn't it? A. Yes.

Q. The Oregon claim as it stood then consisted of the Parish No. 2, didn't it? A. Yes. [268—118]

Q. Did it take in all of the Parish No. 2 that was on the left-hand bank of the creek, or just a part of it?

A. No, I think there was a part of it not included in there.

Q. There wasn't any on the right-hand side of the creek included in either one of the Oregon claims?

A. Yes.

Q. Which part on the right-hand side of the creek was included in either one of the Oregon claims?

A. As you go up Gold Creek there would be a point on the right-hand side of the creek at a point—well, between the bunk-house and the Lotta, just at that point, that would be within the boundaries of the Oregon.

Q. Let me understand you, Mr. Kinzie; would that part of the Parish No. 2 claim, as was contended for, on the left-hand bank which had some tunnels in it, would that be on the Oregon claim? A. It would.

Q. This flume that you put in there that you claim you got your diversion through on October 3d, do you say that was the same as your flume that you

(Testimony of R. A. Kinzie.)

afterwards constructed, and the flume that is now constructed? A. It is the same size, yes.

Q. What do mean by the same size, Mr. Kinzie?

A. Same width and same height.

Q. What size is it? A. Three by three.

Q. And that is the same size as your flume that is now constructed? A. Yes.

Q. Of course that identical flume is not part of your flume as you afterwards completed it?

A. You mean that identical lumber? [269—119]

Q. Yes. A. I doubt it very much.

The COURT.—How much water will it carry?

A. That is a very steep grade—between four and five thousand inches; most of the time the water is flowing right over the top of the flume.

Q. That is what the piece you first put in there would carry? A. Yes, sir.

Q. Did you ever compute that grade to find out—

A. No, it is very hard to compute, because the head is such that by looking at that photograph you can see the water is below it, right in front of that it is a very steep grade, and the flume is about 8/10 per cent grade.

Q. What do you mean by 8/10 per cent grade?

A. Eight-tenths of one per cent grade—8/10 of a foot in a hundred feet.

Q. When you put your flume in eventually as it is now put, what slant would that be right where it is put in—that is, about what angle would it strike a perpendicular line erected at that point?

A. I don't think I exactly understand what you

(Testimony of R. A. Kinzie.)

mean; you mean the grade of the flume?

Q. I mean about what angle would the grade of the flume make with a perpendicular line erected where the water comes into the flume—it isn't flat?

A. No, it is a grade; the average grade from the first part of the flume to the intake of the water tunnel is something over $1/2$ of one per cent.

Q. What is the grade down to your air-compressor?

A. To the air-compressor, that would be about that grade.

Q. It varies, doesn't it? A. Yes.

Q. And that is one of the reasons why you say it is hard to [270—120] compute?

A. No, you can assume a grade without computing it exactly.

Q. One part of it is lower than the rest?

A. The grade changes.

Q. That is why it is hard to compute?

A. No; in cross sections you can compute it exactly.

Q. Have you computed it exactly in this case?

A. No, sir; I haven't; I intended to but I neglected it.

Q. Now, Mr. Kinzie, do you use all the water that comes through your flume to run your compressor with at Snow Slide gulch?

A. We have used it all—we are using all the water we can get from the flume now.

Q. Does it require all the water you can put through the flume to run your compressor at Snow

(Testimony of R. A. Kinzie.)

Slide gulch? A. No, sir.

Q. About what part of the water required does it take to run your compressor at Snow Slide gulch?

A. The first compressor required it all, because it was a light head, and we had an eight or ten nozzle which took practically all the water the flume would carry; but on the second compressor I think we had three $3\frac{1}{4}$ or $3\frac{1}{2}$ nozzles under a head of 90 feet and it didn't require all the water.

Q. There has always been a lot of waste water going through your flume, hasn't there?

A. When the water is high in Gold Creek there is a great deal more than we can take in our flume.

Q. How do you get that water down to the shore line here? A. Through our flume.

Q. It goes through your flume and you use it at your air compressor, and then it comes through your flume to the [271—121] shore line?

A. Part of the water that is used in the compressor don't come down, it is turned in the creek—in our No. 2 compressor.

Q. Well, then, the water that comes through here is additional water outside of that that you use in your air-compressor?

A. We are not using water except in case of emergency at the air-compressor; we are using the water at the mill site.

Q. When did you quit using the water on your air-compressor?

A. We haven't quit entirely; we do in a case of a breakdown; we put in a new compressor here a

(Testimony of R. A. Kinzie.)

couple of months ago I think it was.

Q. You put in a new compressor up there?

A. Yes.

Q. What did you do that for?

A. Driving the drills in the mine, and for ventilation.

Q. But that water that you used at your air-compressor isn't water that is being used at your mill down here at the beach, is it?

A. No, if we used water in the compressor, that water is turned back into Gold Creek; all the water that the flume will carry is being taken down to the mill site and is used on the mill site.

Q. What have you been using it for there?

A. Milling purposes and sluicing and grading off.

Q. Now, Mr. Kinzie, how much of your additional units of the 40-stamp mill that wasn't constructed at the time the application was made in this case, have you now constructed?

A. Already constructed and running?

Q. The one you were working on at that time, how much of any additional units have you constructed since then?

A. There has been 10 more stamps, regrinding machinery, extension to the building, and rock-house erected. [272—122]

Q. Have you extended the building that was on your mill site here on the beach, since the application for the preliminary injunction in this case?

A. We have; yes, sir.

Q. How much have you added on to it?

(Testimony of R. A. Kinzie.)

A. We have added enough room to cover 20 stamps, and we have now almost finished the first installment in addition to the 40 stamps.

Q. You have made the building larger?

A. Yes, we have.

Q. The building itself larger? A. Yes, sir.

Q. How many feet have you added on to it?

A. 350 feet to the bottom part, and to the upper wings we have added about 18 or 20 feet.

Q. You have completed your first unit?

A. We have 50 stamps now, and are working on the extension of the mill now.

Q. Now, Mr. Kinzie, have you been using all the water at your mill that has been coming through your flume? A. We have.

Q. What have you been doing with it—using it for?

A. For milling purposes, sluicing off the hillside, and keeping the tailings from accumulating on the beach, taking it down under our wharf and distributing it to prevent the teredoes from eating up our piles.

Q. Now, there has been a stream of water running down that hillside and it has cut a well-defined channel, and has been running down there for a month or so that way.

A. That water is carried down to sweep out our tailings in the mill, and also for sluicing and hydraulicking the foundation for the power plant, filling in under our carpenter shop, for fire protection, also used to wash the tailings under the [273—123]

(Testimony of R. A. Kinzie.)

wharf, and also to keep the teredoes from eating the piles.

Q. That is some of the purposes you intend using the water for? A. Yes, sir.

Q. To keep teredoes out of the piles?

A. That is one purpose of it.

Q. How long has that water been running in that channel?

A. That is the end of the present flume; we have used part of that for hydraulicking this summer, washed off several hundred cubic yards of material.

A. I will hand you a photograph and ask if you recognize that to be a photograph of your mill, that you have been testifying to? A. I do.

Q. The stream of water shown there, how long has that been running in that channel?

A. More or less while there was water in Gold Creek we always allowed a certain amount of water to go ahead and that water is caught up by the flume in the middle of the picture and carried down to the flat that is just below the right-hand edge of the picture.

Q. How much extra ground have you sluiced off with that water since the preliminary hearing in this case?

A. We have sluiced off the entire portion of the ground shown to the west of the mill, or to the left-hand side of the picture; we have sluiced off a portion of the ground in front of the mill for a distance of 18 feet; we have sluiced off a portion from the lower easterly corner of the mill along the line as

(Testimony of R. A. Kinzie.)

indicated by the pipe-line shown in the photograph; we have sluiced off the tail-race through which the water is now running from the pipe-line down through the tail-race; we have also sluiced off and cleaned off a portion of the ground which is indicated in the middle upper part of [274—124] the picture.

Q. Wasn't the most of this ground that is indicated in this photograph, or a large portion of it, sluiced out at the time the application was made?

A. There was a portion of it sluiced out at that time.

Q. How long did you say the water has been running in that particular place?

A. There is always some water through there, that is required to run down and keep the tailings from accumulating on the beach.

Q. Did you say in one of your pictures that there wasn't any water running down there—Plaintiff's Exhibit No. 16—is there any water running down there?

A. There is some water running there, very little.

(Whereupon an adjournment was taken until 10 o'clock to-morrow morning.)

MORNING SESSION.

June 24, 1914, 10 A. M.

R. A. KINZIE, on the witness-stand.

Cross-examination (Cont'd.)

(By Judge WINN.)

Q. Mr. Kinzie, I think in reply to a question Mr. Hellenthal propounded to you you stated your mill

(Testimony of R. A. Kinzie.)

in the basin was just back of your mill which you constructed on the beach; I will ask you to look at Plaintiff's Exhibit No. 1 and point out as to where your mill up in the basin is.

A. You are mistaken about my answer; I didn't answer any such thing.

Q. I ask you to look at this map and point out on it where your mill is up in the basin?

A. Our mill up in the basin? [275—125]

Q. Yes.

A. It is in the upper center by these large black marks up under the words "Mine" in "Mine Workings," the upper portion of the map.

Q. Now, your mill that you have been testified concerning as being down at the beach, is indicated on this exhibit by what?

A. It would be about the location of the word "Location" in the title "Location of 12,000-ton Milling Plant," on the lower left-hand corner of the chart.

Q. What is the distance approximately between that mill and the one up in the basin, up near where "Mine Workings" is, approximately?

A. 22 or 23,000 feet the way you have to go to get up there.

Q. Well, across on a straight line how much is it, approximately? A. About 10,000 feet.

Q. About 10,000 feet on a straight line. Now, Mr. Kinzie, you told Mr. Hellenthal considerable about some work that had been done in and about the Alaska Juneau property prior to the year of 1910—

(Testimony of R. A. Kinzie.)

we will say prior to July, 1910; that work that you carried on then looking towards the opening up and development of this property was conducted at what particular point, if you will indicate them upon the Plaintiff's Exhibit No. 1?

A. They are all conducted on the southwest, you might call it the southerly side of Silver Bow basin; it consists of short shafts, ground sluicing and work of similar nature.

Q. Was any of this work you spoke of done down on what you claim to be the Oregon claim, down near where you commenced your Gold Creek tunnel, the big tunnel that commences near Snow Slide gulch? [276—126]

A. That tunnel is not on the Oregon claim, it is on the Colorado claim.

Q. I say have you done any work down in that vicinity and in the vicinity of what you claim to be the Oregon Lode Claim?

A. The assessment work has been done on the Oregon claim for a number of years.

Q. Now, isn't it a fact, Mr. Kinzie, that there hadn't been any work done in and about the Colorado claim and the Oregon claim between the year of 1905 and up to 1910?

A. No, I think—there might not have been any assessment work done there but there was a great deal of other work done.

Q. Might not have been any assessment work done?

A. I don't remember the exact dates of the assess-

(Testimony of R. A. Kinzie.)

ment work at this time.

Q. You patented the Colorado, Mr. Kinzie, did you not, in 1904?

A. It was 1904 or '05, I have forgotten which.

Q. Now, this Colorado claim, when you undertook to patent it you found that it conflicted with what is called the Parish No. 1, didn't you, Mr. Kinzie?

A. There was a controversy that came up in regard to it; yes.

Q. You have been well acquainted, Mr. Kinzie, have you not, with this Alaska-Juneau property ever since you came to Alaska? A. I have.

Q. Now, then, you said something yesterday in your direct examination to Mr. Hellenthal about not knowing where the lower side lines of the Lotta claim were at the time that Mulligan made his location notice; how did you and Mr. Bradley figure out as to where to send Mulligan up there to post any notice?

A. We figured from the patent plat.

Q. Of the Lotta patented claim?

A. Lotta claim, yes.

Q. Is that all you used? [277—127]

A. I don't remember what else we used; we had a topographical map there.

Q. Don't you know, Mr. Kinzie, that you used principally some ties that were put on to one of your lower claims, the Idaho or Colorado, and then figured on up the creek leading to the intervening claims, and that is the manner in which you arrived at the point which you sent Mulligan to?

A. No; it is not.

(Testimony of R. A. Kinzie.)

Q. Do you know whether or not Lindsay went up there after you made the survey, he and Wayland, and undertook to find the lower side line of the Lotta claim, and didn't they commence at corner No. 5 of the Idaho claim and measure on up the creek and undertake to find out the lower side line of the Lotta in that manner?

A. They ran a survey up the creek at the time of the first injunction proceedings.

Q. Ran a traverse line, didn't they?

A. That is a survey.

Q. They didn't make a survey of the exterior boundaries of the claim?

A. A traverse line is a survey.

Q. Is it a survey of a mining claim?

A. It could be.

Q. It could be a survey to find out where the different lines are, could it?

A. That is the proper way to locate it if the stakes are in the ground.

Q. Then, you know that these parties, when they went up there, did commence at some corner of the Idaho claim and ran a traverse line up the creek in order to ascertain or find out where the lower side lines of the Lotta claim were, don't you? [278—128]

A. No, I don't know where they started; they ran a survey at the time of the first hearing to find out if they were on the Lotta claim.

Q. You don't know how they made that survey?

A. They made it in the usual way, ran a traverse line.

(Testimony of R. A. Kinzie.)

Q. Where did they commence?

A. I don't know.

Q. If they commenced down on one of those claims—take for granted that they commenced at corner number 5 of the Idaho claim, do you think it is probable then that they ran a traverse line up the creek?

A. Yes.

Q. Now, those intervening claims that they would cross before they reached the Lotta claim, are all junior claims to the Lotta claim, are they not?

A. The Lotta, yes.

Q. The Lotta was one of the oldest claims up there, wasn't it? A. Yes.

The COURT.—Judge Winn, just a minute; I don't recall any testimony as to where the Mulligan notice was, consequently I can't see the relevancy or the pertinency as cross-examination of any testimony as to where the Lotta was.

Judge WINN.—Very well, I will not ask Mr. Kinzie any further questions directly on that line.

Q. Now, Mr. Kinzie, let's get down more definitely, if we can and find out what was done upon the Oregon Lode Claim between the year of 1905 and up to the year of 1910; now, I understand that there was nothing done in and about the Oregon Lode Claim or the Colorado Lode Claim except some geological examinations that were made by you or some one on behalf of your company; there was no assessment work done at any time on the Oregon claim between the years of 1905 and 1910? [279—129]

(Testimony of R. A. Kinzie.)

A. You mentioned Summers going up there to show Harri?

Q. That isn't in the question.

A. Now, what Oregon claim do you mean?

Q. Is there any difference in the Oregon as located by Datson and located by Corbus?

A. There is; Summers knew nothing about the Oregon located by Corbus.

Q. One of these claims was located in 1899, wasn't it? A. It was.

Q. And one in 1910?

A. Yes, sir; 1910, that is the claim that Mr. Summers knew about, the one located in 1910.

Q. That is the one he was sent up to find out the boundary lines of?

A. That is the one he knew about.

Q. And the one that was located in 1910, and the one that was located in 1899 covers the same ground?

A. Practically the same ground; yes.

Q. Now, what I want to find out, Mr. Kinzie, is what work, if any, between the years of 1905 and 1910 you did down in the neighborhood of the Oregon claim; I don't care which Oregon, and in the vicinity of the Colorado claim—what was done there between those years? A. In 1895?

Q. 1905 to 1910.

A. 1905—now, I am not quite sure whether that was the year the patent was issued to the Colorado or not, but we can assume that it was in that year; the conflict as shown on that map, we had an agreement with the Ebner Company which recognized our

(Testimony of R. A. Kinzie.)

right to drive a tunnel through that ground that is mentioned in the agreement with Ebner, and that was one of the principal objects of going to patent with the Colorado claim at [280—130] that time, that is, instead of going and fighting the thing in court.

Q. Cut that a little short. A. No, I cannot.

Mr. HELLENTHAL.—Let the witness answer the question.

Q. I am asking what work—simply what work was done there, Mr. Kinzie?

A. That was part of the work that was necessary for our tunnel that was to start at Snow Slide Gulch and go through into the Basin.

Q. You say you got a contract between 1904 and '05 out of Ebner?

A. No, we didn't get a contract out of Ebner at all; it was a compromise of the disagreement over the ownership of part of the Colorado Claim, and in that we especially mentioned our plan of driving this tunnel, and the right of way for the tunnel was included in the deed.

Q. Do you call that work on a mining claim?

A. Yes.

Q. What other work did you do besides entering into a contract with Ebner?

A. I am not sure what year the assessment work on the Corbus-Oregon stopped; the year that the Utah went to patent, that was 1905 or '06—I am simply stating from memory, the date of the patent, the tunnel survey was connected and tied down to the

(Testimony of R. A. Kinzie.)

proposed location of the mouth of the Gold Creek tunnel by Alfred Williams; Alfred Williams was then surveying and tied in, I think, the Nevada claim and the Maryland claim on the upper end of the Colorado, but I don't remember if any work was done in the lower tunnel on the Colorado that year or not.

Q. Maybe I can refresh your memory by this Basin case, No. 2155 of the Circuit Court of Appeals, *The Ebner Gold Mining Company vs. the Alaska-Juneau Company*, in Volume 3, page 870 of [281—131] the printed record in that case, I will ask you if this refreshes your memory—it is reading from your testimony in that case: “Q. You knew Mr. Ebner was laying claim at that time, however, to the Parish No. 2 and Parish No. 1?”—That is the time you claim you had your settlement and that is referring to that time—“A. He came to me and told me so, and it made very little difference to us—all we wanted was the right of way for our tunnel through there”—then it says, “Whereupon Court adjourned until to-morrow morning at 10 o'clock”—and then we came back and these questions were asked: “Q. Since the Colorado claim was surveyed for patent in 1904 what work, if any, had been done on the Colorado Claim down say to the year of 1910? A. I think nothing has been done there except the survey lines have been run, connecting that for a tunnel through there. Q. In fact, there has been nothing done up there except what you have just mentioned since these claims went to patent on any of the bunch of claims, the Idaho, Colorado or the Oregon Lode

(Testimony of R. A. Kinzie.)

Claim, since 1905? A. Yes, sir. Q. What did you do on the Oregon Lode Claim? A. A detailed geological study has been made of all that ground.”—Then the Court said: “Is it patented?”—and you say: “Yes, sir. Q. You have not done any work that was underground work or running any tunnels or any work of that kind on any of this property since 1905? A. There has been no tunnels run at all until last year. Q. What did you do on the Oregon claim, if anything, since 1905? A. A detailed geological study was made of that entire country; the maps that were used in the geological study were made; a line of tunnel was brushed out and two surveys, I think, were made connecting the proposed tunnel with a point in the basin. Q. You have described approximately what has been done since 1905 without going into details? A. Yes, sir.”—[282—132] Now, are those facts true? A. They are.

Q. Now, I will hand you a map or plat which has been detached from Volume 5 of the printed record in the case No. 2155 of the Circuit Court of Appeals, being the Ebner Mining Company vs. the Alaska-Juneau Company, and being the case in which an ejectment suit was brought to eject your people from two mining claims; I will ask you to look at this map and plat, which has evidently been offered in evidence once before in this case and is marked Defendant’s Exhibit “B,” received in evidence January 14, 1914, and I will ask you if you recognize that as one of the plaintiff Company’s exhibits that was offered in that case?

(Testimony of R. A. Kinzie.)

The COURT.—Which case, Judge Winn?

Judge WINN.—The one I last mentioned, 2155; it is one of the exhibits that they offered in evidence originally in cause 2155 of the Circuit Court of Appeals, which was the ejectment over two mining claims up there.

The COURT.—In which case was this exhibit offered?

Judge WINN.—I mean No. 2155 of the Circuit Court of Appeals, being the case of the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company.

A. I have seen a similar map, but I don't remember if this is the exact copy of the map or not; I couldn't say as to that.

Q. Don't you know, Mr. Kinzie, that that identical map, of which that was a tracing, was one of your principal exhibits in that basin case, that Mr. Stewart testified on so much?

Mr. HELLENTHAL.—Is that one of the Plaintiff's Exhibits at that time—the Ebner Company was the plaintiff in that case.

Judge WINN.—I know, but we offered it in evidence in the preliminary hearing as Plaintiff's Exhibit, but originally it was the Alaska-Juneau Company's exhibit in No. 2155 of the Circuit Court of Appeals. [283—133]

Mr. HELLENTHAL.—It is our number all right, but it is the defendant's exhibit.

Q. What do you say about it, Mr. Kinzie?

A. I think it is, but I don't know positively about

(Testimony of R. A. Kinzie.)

it; I have a reason to believe that it is a copy of the same map.

Q. I will have this marked for identification as our exhibit. I will ask you to look at this map and state whether or not the cabin that Harri built isn't on the Cape Horn No. 1 or the Cape Horn claim?

A. It is above the Cape Horn on the Oregon, both Oregons, as shown by this map.

Q. As shown by that map of yours?

A. I don't say the map is ours, but I rather think it is.

Q. Well, if the Oregon claim does not exist then it would be left on the Cape Horn claim, wouldn't it?

(Not answered, because of objection.)

Q. You have no doubt, Mr. Kinzie, but that this is an absolutely correct survey made by your people and was offered in evidence in that other case, have you?

A. I rather think this is the map.

Q. I will ask you, Mr. Kinzie, to look at this map, which has been marked for identification, and see the cabin of Harri indicated on it—you see it do you?

A. I see a cabin, yes.

Q. That is the Harri cabin, isn't it? A. Yes.

Q. From that point down the creek towards the Jualpa dam, where did you build your trail, can you indicate? A. Yes.

Q. The first trail where did it come from; indicate some point so that we will understand it; that is, I mean the first trail that Harri brushed out that you claim was brushed out when you went up there in August? [284—134]

(Testimony of R. A. Kinzie.)

A. I don't know what the first trail was that Harri brushed out; I know the trail that was on the ground the first time I was up there.

Q. The first time you were up there then?

A. I will mark it in red pencil as nearly as I can.

Q. Now, you have marked it approximately in red pencil?

A. I have marked the old basin trail in red pencil with the word in red pencil "Trail"; the trail from the bunk-house up the creek I have marked in red pencil above the word cabin by the letter "T"; the other trail from the Jualpa dam to the portal of Gold Creek tunnel in Snow Slide Gulch is shown by red lines marked "T-1" in each case.

Q. Now, is that approximately the trails that you found up there when you went up—what day was it?

A. That was August 3d.

Q. And Harri was doing that himself—had done that himself in two days, had he?

A. No, it had been three days?

Q. You were there in the afternoon of the 3d?

A. Yes.

Q. And Harri was working alone on that?

A. No, Harri was not working alone.

Q. He was working alone those two or three days on the trail? A. No, sir.

Q. Who was helping him?

A. I think he had help on this lower trail from the time—to the best of my knowledge, this trail from the Jualpa dam up to the portal of the Gold Creek tunnel, but very little of that work was done

(Testimony of R. A. Kinzie.)

by Harri; that was done by others.

Q. Between the 1st and 3d of August? A. Yes.

Q. Don't you know it is a fact, Mr. Kinzie, that Harri has [285—135] testified and you have testified that there was nobody up there helping Harri between the 1st and the 3d?

A. No; that was on different trails; you have asked him about trails and he became confused on it; the trails he was referring to were the trails up the canyon; I don't think he testified about the trails below the cabin.

Q. I am talking about the first trails, between the 1st and 3d? A. Yes.

Q. Do you want the Court to understand now that between the 1st and the 3d of August there was anybody assisting Harri on the trails that you have marked out on this map?

A. I wish the Court to understand there were men assisting Harri in building the trails that I have just marked.

Q. During the period between the 1st and 3d?

A. During the period between the 1st and 3d.

Q. Who was up there helping him?

A. Russell Casey was one of them.

Q. When did you find that out?

A. When did I find that out?

Q. Yes.

A. I knew there was some one there, but I have only found out lately about it by referring to our payroll and from a conversation with Russell Casey.

Q. Then, if you testified before that there was no

(Testimony of R. A. Kinzie.)

one up there to help Harri, you were mistaken about it?

A. If the question were asked in that way I would not be mistaken, it just depends on how the question is asked.

Q. Now, Mr. Kinzie, in your testimony in this other case, No. 2155, Volume 3, found at Page 903, didn't you testify as follows, referring to those two trails: "A. No, the two trails that were built were leading from the cabin, one up the grade and one around the cliff over the top; that came around by the side of our present dam—that is evidently [286—136] the other claim, which is not involved in this controversy." Now, I will ask you if I didn't ask you this question: "Q. After this cabin that Harri occupied down there at Snow Slide Gulch was built—not considering the men who assisted in building that cabin, but what other men besides Harri did you have working up there along about the 1st of August, if any? A. There were no other men. Q. When did you put on any other men up there to assist Harri? A. I think it was September 10th." Did you so testify in that other case?

A. I did; those trails reported there were not the trails you are just asking about; those were the trails above the bunk-house.

Q. Let's see, Mr. Kinzie,—“Q. After this cabin that Harri occupied down near Snow Slide gulch was built—not considering who assisted in building that cabin, but what other men besides Harri did you have working up there along about the 1st of August,

(Testimony of R. A. Kinzie.)

if any? A. There were no other men. Q. When did you put on any other men there to assist Harri?

A. I think it was September 10th." Did you testify that way, or didn't you?

A. I did, and it is perfectly correct.

Q. I want to know if you testified that way?

A. Yes, I testified that way.

Q. Now, I don't believe I asked you this question yesterday, Mr. Kinzie,—respecting the distance down the creek from where your dam was ultimately constructed before you reached any grade, I will ask you if, on the application for the preliminary restraining order in this case respecting this distance I have just mentioned, if you didn't testify as follows: "Q. Now, it is a fact, isn't it, that when you claim you got your diversion that there was a distance between where you put your flume in the creek to where your [287—137] grade commenced, of about three or four hundred feet that wasn't graded or built on there? A. There was a distance beyond the present penstock. Q. No, I mean away up in the flume near your dam where you say you made your diversion, now, at that point, if you follow that down the present flume line, the time you claim to have made the diversion there was a distance there of about three or four hundred feet that had not been graded for a flume line at all—just the earth in its natural state and condition? A. There was a distance that had not been graded from two to three hundred feet; yes, sir—around close there. Q. As I understand your testimony, as you gave it in that

(Testimony of R. A. Kinzie.)

other case, you stated about 300 feet? A. Yes, 300 feet; that would be close to it, between two and three hundred feet—I could give this distance a great deal more accurately from that map.” That is winding up that answer. Did you testify that way in the other case? A. I very likely did, yes.

Q. Now, Mr. Kinzie, this large map here Plaintiff’s Exhibit 1, or a tracing similar to that, the plaintiff company has been posting them up about in public places, have they not, around this town and elsewhere?

A. No, I don’t think any similar to that; there is a small outline map that is posted—that was posted about a year ago in September.

Q. It covered virtually the same property you have covered on this map, does it not?

A. It covered part of the same property shown on that map—nearly all of it.

Q. What part?

A. I am not able to say without comparing the two maps; there has been property acquired by the company since the date of that map. [288—138]

Q. That has been used as an advertising medium to sell this stock, hasn’t it?

A. They are not selling any stock.

Q. Haven’t they had any stock on the market?

A. No, not to my knowledge, and I don’t think they have.

Q. Will you swear positively to that?

A. Will come close to it.

Q. How close,—do you swear positively to that?

(Testimony of R. A. Kinzie.)

A. I don't know; it is none of my business.

Q. Now, this mill up in the basin, Mr. Kinzie,—there are a few straggling questions I want to ask you—that you have pointed out on this map as being built up about the word “Mine Workings,” I believe you said to Mr. Hellenthal that was never built as a commercial mill but was principally for testing purposes? A. No, I didn't say that.

Q. What did you say?

A. I said we used it for testing purposes and sampling purposes, and has been run for the last 10 or 12 years.

Q. In other words you haven't made it a commercial proposition, running that mill.

A. That mill has paid for itself; yes, sir; but that wasn't the object of doing the work; the mill can be a commercial success and also turn out the results of sampling.

Q. But you used it principally how many years for sampling purposes? A. Ever since I came here.

Q. And that would be 1901—are you still running it? A. No.

Q. When did you cease, Mr. Kinzie?

A. Year before last.

Q. And you consider as a mining man that using that mill for that [289—139] purpose, and running this underground work, was looking toward the opening up and the developing of this property?

A. I certainly do, yes.

Q. Now, just one more question along the line as to who was assisting Harri up there between the 1st

(Testimony of R. A. Kinzie.)

and the 3d—when did you find out, Mr. Kinzie, that anyone was assisting Harri up there between the 1st and the 3d?

A. Oh, I cannot say the exact time when I found it out.

Q. Did you find it out since you testified in this case on the preliminary hearing?

A. As to who it was?

Q. Yes. A. Yes.

Q. Well, now, did you know at the time you testified on the preliminary hearing that anyone assisted Harri to make the two trails that you have just marked on this identification exhibit?

A. I have shown more than two trails.

Q. Well, I will ask you if you knew at the time that you testified on the preliminary hearing for an injunction in this case that anyone had assisted Harri between the 1st and 3d of August, inclusive?

A. In doing what work?

Q. Doing any work looking toward the building of trails. A. Yes.

Q. You knew it at that time when you testified?

A. Yes.

Q. Well, now, let's see if you didn't testify as follows in regard to that—

A. Be careful how you ask the question, Judge.

Q. Yes, see if you answered them this way or not: "Q. Didn't anybody go with him"—referring to Harri, found on Page 41 of the transcript of the testimony that was taken on the preliminary hearing for a temporary restraining order in this [290—

(Testimony of R. A. Kinzie.)

140] case. Now, referring to Harri going up there the question was as follows: "Q. Didn't anybody go with him—you know if anybody didn't go with him, don't you? A. No, I don't. Q. You didn't send anybody up there with him? A. I do not even remember whether we did or not; to the best of my recollection I don't remember sending anybody. Q. And he went up there; at least you sent him up there—now, what time after that did you go up there, Mr. Kinzie? A. Well, it must have been two or three days later. Q. Now, you testified on the trial of *the trial* of that Basin case that you went up there on the 3d or 6th, and that you didn't remember which, didn't you? A. I very likely did. Q. Now, you say that your memory is that you went up there absolutely on the 3d? A. I will change it from the 3d to the 6th, but my recollection is the 6th—I don't remember exactly the date; I will get that date exactly, I should have done it before." Now, you testified to that on the other hearing, did not not, Mr. Kinzie?

A. No, I told you, Judge, I don't think that is correct; part of it is correct and part of it I don't think is.

Q. Now, the part that you testified that you didn't send anybody up there with Harri is correct, isn't it?

A. I don't remember testifying about it at all, but I think very likely it is as reported there; the question must have been taken down—

Q. Further on—"Q. Now, how much work did you say Harri did? A. He had leveled off a place

(Testimony of R. A. Kinzie.)

just about where the Alaska-Juneau cabin has been constructed; he had also cleaned out a trail on the right-hand side of the creek going up to a point about 75 feet above the cabin, and at that time he had put some plank across a log in the middle of the creek, by which to cross the creek; and he had started, if I remember correctly, on the brushing out—Yes, I am quite sure that he [291—141] had started on the brushing out of the trail to take him up to the Beaver Butte, along the top of the cliff and down to a point practically identical with the present intake of the flume.” Did you testify to that?

A. To tell the truth, Judge, I never testified to the Beaver Butte.

Q. Did you testify substantially that way?

A. Yes, I did; as far as the trail above the cabin goes, I did.

Q. “Q. He knew just where the flume was going to be? A. No, sir. Q. This man had an artificial limb? A. Yes, sir.” You testified to that didn’t you?

A. Very likely did, don’t remember.

Q. “Q. All this work was done between the 1st and 3d day of August by this one-legged man. A. It was.” You testified to that on the preliminary hearing, didn’t you?

A. Very likely did; it is quite true, also.

Q. And you knew at that time there was somebody else assisting him, did you?

A. Not on that work, no.

Q. Well, what work did Harri do up there between

(Testimony of R. A. Kinzie.)

the 1st and 3d, if the work—if it isn't the work that Harri had testified he did.

A. Well, Harri did do that work just as I testified.

Q. And he did it from the 1st of the 3d?

A. From the 1st including the 3d.

Q. **And there was no one helping him?**

A. Not on that work.

Q. What work were you testifying to, then?

A. I was testifying in regard to the trail leading from the Alaska-Juneau bunk-house up the canyon.

Q. The one you are testifying to now?

A. That is the trail leading from the bunk-house up the creek, up [292—142] to where he had a plank across the creek.

Q. Those are the only trails that were made between the 1st and the 3d. A. No.

Q. Had Harri made other trails besides those?

A. No, I didn't say that Harri made them.

Q. Did you see any other work that was done up there on the 3d other than what you have testified concerning and marked out on this exhibit?

A. No, that is all the work I saw, the work I have marked on the exhibit.

Q. You then want to be understood that this testimony you gave upon the preliminary hearing, that you didn't intend to say there was nobody up there?

A. On the trails as I testified to in the preliminary hearing, that is exactly correct.

Q. This question here: "Q. He knew just where the flume was going to be? A. No, sir. Q. This man had an artificial limb? A. Yes, sir. Q. All

(Testimony of R. A. Kinzie.)

this work was done between the 1st and 3d of August by this one-legged man? A. It was." And this time you state you don't remember anyone helping Harri up there between the 1st and 3d?

A. There wasn't anyone helping on those trails, but on the trails up to the bunk-house.

Q. Then, you misunderstood these questions on the preliminary hearing?

A. Not at all, I understood them perfectly.

Q. Have you ever testified in any of these cases that Harri had anybody up there between the 1st and the 3d, helping him? A. Yes.

Q. That there was anybody up there with Harri from the 1st to the [293—143] 3d? A. Yes.

Q. In what case did you testify to that?

A. I don't remember, I testified in four or five of them, I don't remember which one.

Q. You didn't testify in the Basin Case, No. 2155, did you, that he had anybody up there with him?

A. I don't remember.

Q. You evidently didn't testify in the application for a preliminary injunction in this case, that he had anybody up there with him, did you?

A. I don't remember.

Q. Now, Mr. Kinzie, I think you said either on your cross-examination or direct examination yesterday that since the trial of this case upon the preliminary application for an injunction, that you had installed a new air-compressor somewhere up about or near Snow Slide Gulch, is that true?

A. Quite true.

(Testimony of R. A. Kinzie.)

Q. Where is that installed with reference to the portal of your Gold Creek tunnel?

A. About 700 feet this side.

Q. It is included in that sheet iron building or corrugated iron building?

A. It is covered by a corrugated iron building.

Q. What did you say was the capacity of that, what cubic foot of air per minute?

A. I didn't say.

Q. Well, what is it?

A. That machine is about 900-980, I think is the exact capacity.

Q. This other air-compressor that you have got installed at the portal of your Gold Creek tunnel, what is its capacity? [294-144]

A. You mean the water-driven compressor?

Q. I mean the one that you have installed there?

A. That is a water-compressor.

Q. The one at the mouth of the Gold Creek tunnel?

A. The old one is larger than the new one.

Q. What is the capacity of that?

A. I don't remember.

Q. Does it exceed 900 cubic feet per minute?

A. I think so.

Q. You testified before that it was between 750 and 800 cubic feet a minute, didn't you?

A. That is on our mill site, we have a compressor that size there.

Q. You think the one at the portal of your Gold Creek tunnel is probably larger than the one you have installed lately this side of the gulch?

(Testimony of R. A. Kinzie.)

A. Yes.

Q. Those together would have a capacity of somewhere between 1,800 and 2,000 cubic feet of air, would they? A. Yes.

Q. And what is the capacity of the one down at the mill? A. 750 or 800 cubic feet.

Q. That would make somewhere in the neighborhood of 24 or 2,500 cubic feet capacity? A. Yes.

Q. Now, this new air-compressor you have lately installed up near Gold Creek, this side of Snow Slide gulch is electrically driven, is it not? A. It is.

Q. And the one at the mouth of Snow Slide gulch, or at the portal of your tunnel has been partially driven by water at times and then driven by electricity at times, has it not?

A. It can be driven wholly by water or partly by electricity. [295—145]

Q. One side can be driven by electricity and the other by water at the same time?

A. No, if you haven't sufficient water you can use electricity with the water.

Q. Now, Mr. Kinzie, you haven't since you left the witness-stand *yesterday* to find out accurately what your flume will carry between the Snow Slide gulch—the portal of your Gold Creek tunnel and the dam, have you? You have not made any calculation on that?

A. No, I haven't; you mean the flume from the portal of the water tunnel?

Q. The water flume? A. No, I haven't.

Q. I believe you say it takes the full capacity of

(Testimony of R. A. Kinzie.)

your flume to run your compressor at the portal of your tunnel?

A. No, I don't think it would take the full capacity of that flume, it would take approximately the full capacity the way we have been running it.

Q. Then, when you run that air-compressor you would have no water to come down to your mill on the beach and to pass up through your air-compressor between the beach and Snow Slide Gulch?

A. That is the reason we don't run it.

Q. At what time in the development of your property do you think it will be necessary for you to run both of these compressors?

A. We are installing at the present time a very much larger compressor—a 4,000 cubic foot compressor—at a point just this side of the Gold Creek tunnel.

Q. When do you calculate to use all three of these compressors up there?

A. The water compressor we will keep as a spare one; we haven't enough water as it is for the mill.

Q. You don't use any water for power at your mill, do you? [296—146] A. For power?

Q. Yes.

A. No, we are using the water for battery purposes.

Q. What do you mean by battery purposes?

A. We are using it for concentration, for battery water in the stamps, using it in the tail-race, using it for mill purposes, using it lower down for fire protection,—there is a thousand and one uses for water.

(Testimony of R. A. Kinzie.)

Q. How much of the water, Mr. Kinzie, do you calculate that is coming through your flume that you are using in your mill now—I don't mean for sluicing the ground off or any of that water that is overflowing down here at the end of your flume?

A. You mean at the present minute—present time?

Q. Now, yes, sir.

A. We are using something over one-half the capacity of the flume.

Q. Then, if your flume carries between four and five thousand miner's inches of water you would be using about 2000 miner's inches?

A. For milling purposes?

Q. For milling purposes.

A. We are carrying a portion of that water down to the wharf for fire protection, the tail-race too—

Q. Just wait, Mr. Kinzie; I will ask you about those other matters afterwards; I want to know now just how much you are using in your mill for legitimate milling purposes?

A. If you will tell me what the legitimate purposes are I will answer—I will be able to answer your question.

Q. Fire protection is not one and washing tailings is not one—I want to know what you use the water for in the mill?

A. Washing the tailings away is one of the most important uses.

Q. I want to get at—the portion you wash your tailings down with comes out of the flume and goes

(Testimony of R. A. Kinzie.)

down the hillside as [297—147] illustrated in that photograph? A. Part of it.

Q. Now, leave that out—I want to know about the water that comes down and passes through your mill? A. Yes, sir.

Q. About how many miner's inches, or what proportion of the capacity of your flume, do you use for that purpose?

A. You mean that is actually passing through the mill building?

Q. Yes.

A. I should say perhaps two-thirds at the present time.

Q. About two-thirds of the capacity of the flume?

A. I, of course, don't mean to be understood as saying that is the exact amount, but the approximate amount. In the first place the water is used in the rock-house for washing the ore as it comes down from the tram line; then a large quantity of the water is used in the bateries, the stamp batteries—that, I should say, is one of the largest uses; then the riffing tables and concentrating tables; there is more water used in the tail-race along each floor; there is additional water used at the Chilean floor; there is more water that is used on the amalgamating table and at the concentrating table on the lower end; there is the overflow water that is collected from the slimes, and so forth, that is used to carry the water from the mill-race into the tail-race; that is the water used in the mill building.

(Testimony of R. A. Kinzie.)

Q. How many tons of water do you use per ton of ore?

A. There will be from 15 to 18 tons depending upon the volume of the stream and the amount of tonnage going through the stamps.

Q. Approximately, Mr. Kinzie, how many miner's inches of water, or what fractional part of your flume constitutes the overflow that is shown in the exhibit which I handed to you for [298—148] identification yesterday, down here at the mill?

A. Oh, I couldn't say that.

Q. Has your flume been flowing to its full capacity? A. The flume itself?

Q. Yes. A. Yes.

Q. Then if you are using two-thirds of the capacity of your flume in the mill, there is about one-third flowing out at the end and going down the hill?

A. Yes.

Q. How much water, Mr. Kinzie, has been going to waste up there at Gold Creek at the overflow place of your flume, somewhere, I think, between your new air-compressor that you have installed since the commencement of this suit and the air-compressor at the face of the tunnel? A. No water going to waste.

Q. There had been no water going to waste and going down the hill there?

A. No, not between the compressor and the portal of the tunnel.

Q. What water has been going to waste then between your new air-compressor and, say, your first tunnel coming towards Juneau that your flume runs

(Testimony of R. A. Kinzie.)

through? A. Lately?

Q. Yes. A. None.

Q. How long ago did that overflow that was there cease?

A. The overflow that you speak of was let's see, that was three or three and a half months ago.

Q. How often are you up on that flume line, Mr. Kinzie?

A. Why, usually, except when I am here in court, every other day or every second day?

Q. And since the trial of this case on the preliminary hearing [299—149] you say there hasn't been any water going to waste up there?

A. I don't say that.

Q. Well, has there been any going to waste up there?

A. I think that waste-way was taken out—taken out just as soon as the high water came in the spring.

Q. Do you remember what time that was?

A. No, I don't; it was soon after the water started running in Gold Creek.

Q. Approximately, Mr. Kinzie, what time—that is indefinite?

A. I should say along in April, perhaps; I will say positively there has been no overflow or any amount of water going to waste between the points I have indicated to you since April.

Q. Is there any overflow of water between your air-compressor at the mouth or portal of your tunnel and your dam?

A. There is right at the dam, yes; there is a sand

(Testimony of R. A. Kinzie.)

box there and the water runs into that to keep the sand washing out through the bottom.

Q. Now, then, Mr. Kinzie, is it your contemplation to carry this development on to such extent that you will use both the air-compressor at the portal of your Gold Creek tunnel and the new air-compressor a little further down towards Juneau which has been installed?

A. You mean use the old water-compressor again?

Q. Yes, sir.

A. It is very doubtful, Judge; we cannot spare the water; we need every bit of water we can get through the flume at the mill, and for that reason it is very doubtful.

Q. Your contemplation is to use the one that you have just lately installed and then put in a larger one for emergency purposes?

A. No, the larger one is for operating; just as fast as we are getting the places opened up we are getting more machines and that requires [300—150] more water.

Q. You are running the new compressor now?

A. Yes.

Q. Full capacity? A. Full capacity.

Q. Running by electricity?

A. Driven by electricity.

Q. What is *you* air-compressor driven by down here at the mill? A. Electricity.

Q. Now, Mr. Kinzie, do you know that the Alaska-Juneau Company has a contract with the Treadwell

(Testimony of R. A. Kinzie.)

Company to supply them with electricity to drive this air-compressor?

(Not answered because of objection.)

Q. Now, there is just one more question, Mr. Kinzie—in this cause No. 2155 of the Circuit Court of Appeals, the Ebner Gold Mining Company against the Alaska-Juneau Company at page 921, I will ask you if you have again testified concerning Harri going up there between the 1st and 3d of August, and those who assisted him or who were there with him, in doing this work, or any work,—I will ask you if you didn't testify as follows concerning this matter on that question when it was before this court for trial: “Q. I understand you had Harri up there from sometime about the 1st of August to some other specific date, before you put anybody there to assist him. Now, leaving out the question of this man who assisted him in building the house or built the house or assisted Harri in getting the lumber before the house was built, leaving those men out of the question, I wish you would fix the date specifically when it was you sent another man up there to help Harri? A. I was on the ground with Hendrickson on September 10th. Q. Hendrickson was the man that took the contract to build the [301—151] tunnel you expected to put through there at Snow Slide gulch, to put your flume through? A. Yes, the contract was afterwards signed up.” You testified to that, didn't you? A. I did.

Q. “Q. Then you were up there on the 10th—that was the first work you had done outside of what

(Testimony of R. A. Kinzie.)

Harri had done? A. Yes, sir, that is, on the flume.

Q. He didn't do the work on the flume? I don't want to confine it to that. A. On the flume or grade—that was the first time we put any additional men to work on the flume or grade. Q. Outside of the service Harri performed? A. Outside of the work Harri performed." Did you testify that way?

A. I did.

Q. "Q. On the 25th day of August, 1910, can you state specifically what had been done by Harri—do you know the condition of affairs up there on the 25th of August, 1910—up to about the 25th? I want to know what Harri had done up there? A. Harri had moved up at that time and was living in the cabin which had been previously constructed. He had built a trail from the house, cutting steps in the side of the bank up the grade line; he had also constructed a trail over the hog-back and over the cliff beyond to Gold Creek at a point where our dam was afterwards established; he had gone up the canyon of Gold Creek and had turned some water out of the creek, to be used for sluicing off the gravel on the east side of Gold Creek—had cleared off some of that gravel at one point for a distance, I should say, of 125 feet—we will say 100 feet—above the present intake of our flume. Q. He had done considerable work for a lame man from the 1st of August up to the 25th? A. He had done a reasonable amount of work; yes." You testified to that, didn't you?

A. I did. [302—152]

Q. Now, Mr. Kinzie, you testified yesterday that

(Testimony of R. A. Kinzie.)

you were first considerably obstructed and hampered in the performance of your work up there by the Ebner people, but you didn't say anything about your company throwing any obstacles in the way of the Ebner people, did you?

(Question not answered—recess for 10 minutes.)

Q. Do you remember about what time in July, 1910, Mr. Bent and his party came up here connected with the property of the Ebner Gold Mining Company? A. No, I don't.

Q. Do you remember they were here sometime in 1910?

A. I remember they were here during the summer of 1910, but I cannot say at this time whether it was July or some other month.

Q. Do you remember what time Mr. Bradley came here in the summer of 1910?

A. He usually comes in the month of June, latter part of May or during the month of June of each year.

Q. Do you remember whether or not he came in June or July of that year?

A. The best of my recollection is it was the early part of June.

Q. You wouldn't be positive of that date, Mr. Kinzie? A. No.

Q. He was here a little ahead of the Bent party, wasn't he?

A. I rather think he was; I think he was here at the same time; I don't remember, however, exactly.

Q. Was it prior to August 1st that the Bent party

(Testimony of R. A. Kinzie.)

was here—prior to the time that Lock Mulligan went up, as you said, and posted some notice—I will fix that as the date?

A. I cannot say positively as to that; my recollection is that it was, but I am not sure about that.

Q. You know in August of that year you commenced very active work [303—153] up there, did you not, Mr. Kinzie?

A. July and August, yes.

Q. July and August? A. Yes.

Q. And July, I believe, the Canyon or the New Oregon was located, which one, do you remember?

A. The Oregon claim was located in July, and the right of way for the flume was located in July and the preliminary lines for the flume around the shore of Gastineau Channel, that was all done in July.

Q. You mean that the preliminary surveys that you had made, that you testified concerning, were made in July? A. Yes, sir.

Q. Do you remember if that work was done prior to the Bent people coming up here, or just after?

A. I cannot say that; my impression is that it was before they came up, but I am not sure as to that.

Q. But you showed a great deal more activity in and about this part of Gold Creek at that time than you ever have before, didn't you?

A. As to diverting the water of Gold Creek?

Q. Yes. A. Yes.

Q. You hadn't made any effort before that time to divert the water of Gold Creek, had you?

A. No.

(Testimony of R. A. Kinzie.)

Q. And you hadn't done anything in and about Gold Creek either on your so-called Oregon claim or the Colorado claim, or any of those claims, in and about Gold Creek since the year 1904 except what you testified about this morning?

A. We had acquired all the necessary rights for flume and tunnel and things of that kind. [304—154]

Q. I say you hadn't done anything more right around in this vicinity except what you testified to this morning?

A. No, not in addition to what I testified to.

Q. Did you know that the Bent party was coming up here with the expectation of opening up that property on a larger scale?

A. I knew nothing about the plans of the Bent party.

Q. You knew they were up here in connection with that property, didn't you?

A. I must have heard it after they came up here, but I didn't pay any particular attention to what they were doing.

Q. Now, Mr. Kinzie, at the time that you complain you were deprived of the water, which was the foundation of the commencement of this action, how much water were you at that time deprived of?

A. If you will state the time I can answer the question.

Q. The time you commenced this action here?

A. What is the time?

Q. In December sometime; I think in December,

(Testimony of R. A. Kinzie.)

and you claim there had been a shortage of water there, I think, for some three or four weeks prior to the time of the commencement of the action, say in the latter part of December or the early part of January? A. What is the question?

Q. I asked you how much water you were deprived of by the action of the defendant company at the time you commenced this action, sometime in the latter part of November or the first of December?

A. All of the water that was then flowing in Gold Creek.

Q. How much was it?

A. I cannot tell you without looking over the notes in the case; I haven't looked over the records since the trial of that case. [305—155]

Q. Do you know whether they deprived you of water at that time, or for any period of time, that would have run your air-compressor at the mouth of Snow Slide Gulch?

A. My best recollection is that during the most of that period there wasn't sufficient water to run the entire compressor, but there was enough water for jacket water, and running a part of the compressor.

Q. How do you know that if you don't know the amount of water they deprived you of?

A. That is the best of my recollection; we were entitled to all of the water flowing in Gold Creek and we were cut off, and that is the origin of that complaint.

Q. How much water does it take to run a water-compressor of the size of the one you have at the

(Testimony of R. A. Kinzie.)

portal of the Gold Creek tunnel?

A. That would take from 70 to 100 gallons of water per minute.

Q. 75 to 100 gallons of water per minute?

A. Yes.

Q. Just for cooling purposes?

A. Cooling purposes.

Q. On one air-compressor? A. Yes.

Q. And on the compressor you have installed at the mouth of your tunnel, or portal of your tunnel, in November or December of last year, how much would that require?

A. That is approximately—I would figure it backward from the compressor we are putting in now—I had that in mind; that requires 250 gallons per minute for jacket water; taking any proportion of it, it would take 75 to 100 gallons. [306—156]

Q. Which one of these air-compressors are you talking about, the larger one?

A. No, the larger one we are installing requires a vast amount of water in proportion to the cubic feet of air per minute.

Q. It is somewhat in proportion to the cubic feet per minute of air that the water is in proportion to?

A. Yes.

Q. That water could have easily been obtained by you when this action was commenced, could it not, by pumping out of Gold Creek and the streams flowing into Gold Creek? A. No.

Q. You could have obtained enough water for jacket water at that time?

(Testimony of R. A. Kinzie.)

A. The water was all turned out at that time.

Q. The place where the defendant company took it out was a considerable distance up the creek—there was quite a bit of water in the creek between that and the air-compressor, wasn't there?

A. My impression is that all the water had been turned out, but I should say—

Q. You didn't go down the creek at that time to examine that, did you? A. Down the creek?

Q. Yes, in the bed of the creek to see if there was any water flowing in there or not?

A. No, I didn't go down the creek-bed.

Q. Now, not having the amount of water that the Ebner Company got from the time that they closed you down until the water got plentiful, you couldn't state just exactly how much benefit that water would have been to you, could you?

A. I know what we were getting just before they cut us off.

Q. Well, did the water grow less or more plentiful after that, [307—157] for a while?

A. The Ebner people had the use of it, and we don't know how much water there was.

Q. You know from climatic conditions whether it did or didn't?

A. I don't remember the climatic conditions at that time, whether it decreased or increased; they took the water, and we were without the use of the water at that time.

Q. Now, Mr. Kinzie, isn't it a fact for a period each winter, isn't there a period from 4, 5 or 6 weeks

(Testimony of R. A. Kinzie.)

that there isn't sufficient water in Gold Creek to be of any benefit to you or for you to use on your air-compressor at the mouth of your tunnel?

A. There are periods in the winter-time when the water becomes quite low, but even when the water is low we would always have enough water in Gold Creek for jacket water.

Q. You think you would have a flow of at least 75 gallons per hour when the water was low in Gold Creek? A. Oh, yes.

Q. Think there would be plenty in there for that purpose? A. Yes.

Q. Did you state per hour or minute?

A. Minute.

Q. Then do you think that there was sufficient water in Gold Creek during that season, November, December and January of 1913 and '14, to furnish water for your big new air-compressor that you are installing—for jacket water?

A. Yes, during the winter that you are talking about there was; yes.

Q. How was it the winter previous to 1913—1911 and '12, about your having water at your air-compressor at the portal of the Gold Creek tunnel?

A. The winter of 1910 and spring of 1911, that was a good winter; we had water practically all winter on that small compressor; [308—158] the winter of 1912 and spring of 1913, I couldn't tell if we did or not?

Q. Don't you know during one of those periods, one of those winters, you closed down about three or four weeks?

(Testimony of R. A. Kinzie.)

A. In one year since 1910 when the water got quite low, but I have forgotten what year it was—I have forgotten about that.

Q. You don't contend, Mr. Kinzie, that during the low periods of water in Gold Creek in the winter time, that you expect to get enough water to run your 35 or 40-stamp mill in the way you testified you have been using it, do you?

A. Not exactly, no; it would require a great deal more water than we could get from Gold Creek during the low water.

Judge WINN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Kinzie, in response to the questions of Judge Winn, you testified that you had, between the time that you came here and the time that you caused the posting of the Mulligan notice on August 1st, 1910, that you had some plan of also driving a tunnel from Gastineau Channel—did you consider any other plans or any other schemes to determine the feasibility of the project during that period?

Judge WINN.—We object to that as not rebuttal testimony.

Mr. HELLENTHAL.—I didn't ask him the question before—I overlooked it, for that reason I ask it now.

The COURT.—Then you don't pretend to say that this is redirect examination—that you merely recalled the witness?

Mr. HELLENTHAL.—Yes.

(Testimony of R. A. Kinzie.)

A. Yes, there were other schemes that were considered.

Q. What was the scheme?

A. There was one scheme of building a mill in Silver Bow Basin; [309—159] there was also another scheme considered of taking the ore out through the tunnel situated the same as the present tunnel is now situated to a mill in Jualpa Basin, and the present scheme was considered, and the further scheme of a sea-level tunnel from Gastineau Channel.

Q. Now, in the fall of 1909, I think you testified in response to Judge Winn's question that Mr. Bradley at that time formally instructed you upon the plans to pursue, is that right? A. He did.

Q. And you referred to certain correspondence had at that time between you and Mr. Bradley, upon that subject? A. I did.

Q. Mr. Bradley gave you directions, I think you testified in response to Judge Winn's question, in the fall of 1909 to go and locate the water as you did, and go ahead with the scheme, is that right?

A. Yes.

(Objection by Judge WINN.)

The COURT.—Mr. Hellenthal, I would like for you to let the Court know whether you claim this is rebuttal or whether you are still interrogating the witness under the permission given you a few minutes ago?

Mr. HELLENTHAL.—This question is just a preliminary question on his testimony in response to

(Testimony of R. A. Kinzie.)

Judge Winn's question.

The COURT.—That last question is a direct question to the witness.

Q. Mr. Kinzie, I hand you here letters passing between you and Mr. Bradley in the fall of 1909 touching this water right here, and the flume construction, and directions given to you by Mr. Bradley, correspondence from San Francisco to which you have referred; I ask you to identify, merely identify those letters as being genuine, that is all.

A. Yes, these are letters I received, and some other letters. [310—160]

Q. Those letters constitute the correspondence between you and Mr. Bradley upon that subject?

A. They do.

Mr. HELLENTHAL.—I would like to have those letters marked Plaintiff's Exhibit Nos. 17, 18, 19, 20 and 21 for identification. (Whereupon said letters were so marked.)

Q. I will now ask you whether these letters marked for identification Plaintiff's Exhibit Nos. 17, 18, 19, 20 and 21 represent the correspondence between you and Mr. Bradley upon that subject?

A. They do.

Q. Between what dates did that correspondence take place?

A. The letters cover a period between January 28, 1909, to December 11, 1909.

Q. And they contain the directions to you upon that subject? A. They do.

Q. The whole correspondence, Mr. Kinzie, is

(Testimony of R. A. Kinzie.)

necessary in order to find out the specific instructions to you? A. Yes.

Mr. HELLENTHAL.—We now offer this whole correspondence, your Honor.

(Whereupon court adjourned until 1:30 o'clock P. M.)

AFTERNOON SESSION.

June 24, 1914, 1:30 P. M.

R. A. KINZIE, on the witness-stand.

Direct Examination (Cont'd.).

(The said exhibits were not received because of objections.)

Q. I now hand you here a letter marked for identification Plaintiff's Exhibit No. 22, and ask you to look at it and state if you know what that is.

A. I do. [311—161]

Q. What is it, Mr. Kinzie, the original letter received by you?

A. The original letter received by me from Mr. Lewis P. Shackleford, dated November 19, 1909.

Q. That letter is in response to an inquiry you made of Mr. Shackleford in regard to the flume rights and locations of water rights to which you testified on your cross-examination? A. Yes.

Q. And relates to these same water rights and flume rights that you testified about on your cross-examination? A. It does.

Q. And is part of the communication had by you in regard to that matter? A. Yes.

Mr. HELLENTHAL.—I now offer that letter in evidence.

(Testimony of R. A. Kinzie.)

(Not admitted because of objection.)

Q. The inquiry was made from Mr. Shackleford, your attorney, to find out how you would proceed about this work? A. It was.

Q. This letter was written you telling you how to do it?

(Not answered because of objection.)

Q. Now, Mr. Kinzie, Judge Winn was examining you at some length in regard to the use you were putting this water to—you have stated in a general way that the mill you are constructing would ultimately have a capacity of 12,000 tons per day; the general statement of a milling plant of such capacity, 12,000 tons per day, to a man not familiar with mining is not very clear as to how large that plant is; I wish you would compare in any way that you can so it will be plain to a layman how large a milling plant of 12,000 tons per day is, so as to show the use you have for the water.

(Not answered because of objection.) [312—162]

Q. Mr. Kinzie, Judge Winn examined you in regard to water that has been wasted—are you wasting any of the water diverted by you from Gold Creek?

A. No, I am not—we are not wasting any water.

Q. Is there any part of that water that you are not now, and will not be using at all times from now on, in the future?

A. We require not only that amount of water, but more water than we have at the present time.

Q. In connection with what do you require it?

(Testimony of R. A. Kinzie.)

A. With the milling operations principally; in fact, the mill when completed, even allowing a minimum of water for a ton of ore treated, will require the full capacity of the flume up to its carrying capacity as it is at present built, and for other purposes it would require additional water.

Q. The mill, for what purpose will that require water?

A. For milling purposes.

Q. What do you mean by that?

A. Batteries, concentrating and amalgamating purposes.

Q. That is purposes outside of power?

A. Purposes outside of power, yes.

Q. Need that much water without reference to the power water, to propel the machinery?

A. Yes.

Q. At the present time you are using it for battery water, and also for carrying on your construction work on the mill site? A. We are.

Mr. HELLENTHAL.—I guess that's all.

Judge WINN.—No more questions.

(Witness excused.) [313—163]

The plaintiff, to further maintain the issues on its part, introduced as a witness F. W. BRADLEY, who then being duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of F. W. Bradley, for Plaintiff.

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is F. W. Bradley? A. Yes.

Q. You are president of the Alaska-Juneau Gold Mining Company? A. Yes, I am.

Q. How long, Mr. Bradley, have you been president of that company? A. 15 years.

Q. You became connected with it at what time?

A. In the summer of 1900.

Q. You have been in charge of the operations of the company ever since? A. I have.

Q. Do you know what the plans of the Alaska-Juneau Gold Mining Company with reference to future developments were when you became connected with the company? A. I do.

Q. You may state in a general way, Mr. Bradley, what the plans of that company were in so far as they bear upon the appropriation of the water of Gold Creek that is now in dispute—the enlarged development of the property in that connection.

A. The plans of the company when I became connected with it were to run a tunnel from Gold Creek at the foot of Snow Slide Gulch into the mine; a tram from that tunnel to some point either in the Jualpa Basin or on the shore of Gastineau Channel for the milling plant; and in that connection it would be necessary to use water from Gold Creek, and locations [314—164] were made in 1899 to cover the right of way for such a tunnel, and the right of way

(Testimony of F. W. Bradley.)

for the diversion of water from Gold Creek.

Q. That much work had been done toward the execution of that plan at the time you became connected with the company? A. Yes.

Q. At that time, Mr. Bradley, the company had a 35-stamp milling plant in Silver Bow Basin?

A. Yes, they had.

Q. That was situated near the apex of the Alaska-Juneau vein? A. Yes.

Q. The Alaska-Juneau vein proper is how far away from the portal of the present Gold Creek tunnel in Snow Slide gulch—approximately how many feet?

A. It is about 4,000 feet in the tunnel to the vein.

Q. To where the vein is intercepted? A. Yes.

Q. How far does the tunnel extend in?

A. Altogether about 6,500 feet.

Q. That was the same tunnel—it had been commenced at the time you became connected with the company? A. Yes.

Q. Now, Mr. Bradley, what was done by the Alaska-Juneau Company under your direction looking toward the execution of this project since you became connected with the company, in a general way—just tell it in your own way.

A. It has been a problem of determining whether the development of the property on any but a large scale is worth while or not; the whole work has been directed to that end.

Q. What did you do with the milling plant that was on the property—for what purpose did you use that from then on? [315—165]

(Testimony of F. W. Bradley.)

A. We used it first in order to make money; we then discovered that in the very short working season of each year and the very low grade of the ore, it was practically impossible; we then saw that we had to prove the value of the property—determine the average value of the ore, and the mill was used for that purpose, and we did much development work in the way of driving cross-cut tunnels across the vein; the results from these tunnels for a time were disappointing, the ore was very low grade, and we were very doubtful for a while whether we could go ahead with the project or not. We then took fresh courage and did some more cross-cut work and did some more milling, and finally determined that the property was worth taking a chance on, and running the contemplated Gold Creek tunnel, and carrying out the schemes and plans that were in view in 1899. The working out of all these operations has required so much time because of the short working season each year and because of no funds except what could be provided by the operations of 30 stamps on a very low grade ore.

Q. Now, Mr. Bradley, during this time—between the fall of the year 1900, commencing with the time that you took hold of the property in the fall of 1900, did you discuss or consider other plans for the erection of a milling plant elsewhere than on the shore of the Gastineau Channel, as originally contemplated?

A. Yes; we considered several other plans because the running of the tunnel involved more money than

(Testimony of F. W. Bradley.)

we thought the enterprise was worth in the early stages of its development, and we concluded, as one of the plans, to buy some property in Silver Bow Basin and build a large mill in Silver Bow Basin; we eventually gave that plan up as being impracticable and decided that the Gold Creek tunnel outlet was the [316—166] best plan.

Q. Now, when was it, Mr. Bradley, that you came to the definite determination to abandon all other plans and schemes and to carry out the original plan of the company of diverting the water and driving your Gold Creek tunnel?

A. That was in the year of 1909; in that year I directed Mr. Kinzie to locate the water.

Q. Mr. Bradley, do you have anything to refresh your memory from as to the dates when these various things occurred? In that connection I call your attention to a series of correspondence marked for identification Plaintiff's Exhibits 17, 18, 19, 20 and 21 and 22.

A. Yes, it was in my letter of December 11th.

Q. Just say yes or no. A. Yes.

Q. What is it, Mr. Bradley, that you have from which to refresh your memory?

A. I have the letters that you have just handed me.

Q. Now, Mr. Bradley, you may, if possible, from looking at those letters, give the various dates when these things occurred.

A. Referring to these letters I find it was December 11th, 1909.

(Testimony of F. W. Bradley.)

Q. I now call your attention to a letter marked for identification Plaintiff's Exhibit No. 16, and ask you to look at that letter and state the date of the last time that any other plan than the plan which has since been carried out, was considered by you?

A. September 28th, 1909.

Q. I now call your attention to a letter dated in San Francisco, October 28th, and marked for identification Plaintiff's Exhibit No. 20, and ask you to look at it and state from [317—167] that letter what the date was, definitely, when you first directed Superintendent Kinzie to commence operations looking towards the carrying out of this plan of the diversion of water from Gold Creek as has been accomplished? A. October 28th, 1909.

Q. Now, on October 28th, 1909, what were your directions—what did you do with reference to the carrying out of this plan?

A. I asked Superintendent Kinzie to report to me if he could make a water location immediately below the Ebner water wheel.

Q. Did Superintendent Kinzie subsequently report to you that such a location could be made?

A. Yes.

Q. I now call your attention to a letter dated December 21st, 1909, marked for identification No. 19, and ask you to look at that letter and state when it was that you gave positive directions to your superintendent in connection with that location.

A. December 11th, 1909, I directed Superintendent Kinzie to go ahead and make the water location.

(Testimony of F. W. Bradley.)

Q. Where did you direct that water location to be made?

A. Wherever he could make it on certain contours between 4 and 500 feet above sea level.

Q. Where, with reference to the Ebner water-wheel? A. Below the Ebner water-wheel.

Q. Now, when did you come to Alaska, Mr. Bradley—when, after you gave Superintendent Kinzie these directions to which you have testified,—these directions were in writing? A. They were.

Q. Contained in written letters? A. Yes.

Q. And these letters shown you are either the originals or [318—168] copies of the letters?

A. Yes.

Q. Now, Mr. Bradley, when, after the time that you gave these instructions—these written directions which you have presented to the Court and to which you have testified, did you come to Alaska?

A. July 18th, 1910.

Q. These letters were written by you from your office in San Francisco? A. Yes, sir; they were.

Q. And directions were sent from there?

A. Yes.

Q. July 18th, 1910, you arrived in Alaska?

A. Yes.

Q. At Treadwell? A. Yes.

Q. Now, what after that did you do—what was done after that looking toward the carrying out of this plan for the diversion and appropriation of water under your directions?

A. The work had begun before I arrived.

(Testimony of F. W. Bradley.)

Q. The work had begun before you arrived?

A. Yes.

Q. And was it continued upon your arrival?

A. As to that I don't remember.

Q. Do you remember the time of the location of the water? A. I left about August 1st.

Q. You left about that time? A. Yes.

Q. You were suddenly called away, I understand?

A. I was, yes.

Q. What did you do in the way of directing Superintendent Kinzie with reference to carrying out the scheme that was [319—169] first planned—did you give him any other instructions upon the subject?

A. He was already going along with the work when I got here.

Q. There was nothing more to direct him about?

A. No.

Q. Now, Mr. Bradley, you are a mining engineer?

A. Yes.

Q. You are familiar with the ore deposits of the Alaska-Juneau Company?

A. I am.

Q. To what extent are those ore deposits developed?

A. Well, to an indicated tonnage of about five hundred million tons.

Q. For the purpose of making clear what that quantity consists of, how does that compare with the indicated tonnage developed in any other gold producing mines?

(Testimony of F. W. Bradley.)

A. It is very large for low grade ore—

Q. Are there any properties that show a larger developed ore body, so far as is known?

A. None that I know of in a gold mine, no.

Q. What is the character of the plant that you have in mind—Upon what plan were you operating in the year of 1910, when you commenced operations—that is to say, what was the general plan—a little more in detail than you have heretofore given it—that you were working on in the fall of 1909, and that you have carried to completion since—detail it, as near as you can, Mr. Bradley, without going into too many details.

A. I spent the year of 1910 arranging for raising the money for the preliminary work; the work in 1910 was beginning the work on the flume and the starting of the tunnel; we didn't have money enough then to push it along; and it [320—170] wasn't until the next year, 1911, that I had money enough to actively push the work.

Q. What I am asking you about Mr. Bradley, more especially, is the kind of mill you contemplated to build, and how you expected to build it, and get the ore to the mill?

A. The ore was to be mined from the tunnel level, and hauled by tram or cars through the tunnel around the hillside of the Jualpa Basin out to the hillside on the north shore of Gastineau Channel, and be milled at sea level. The water was to be conveyed along the same tramway for economy in construction; the water was to be used for milling

(Testimony of F. W. Bradley.)

and power purposes; the first power purpose was the running of the compressor to be used in the driving of the tunnel.

Q. What was the character of the mill to be constructed, Mr. Bradley?

A. Our experience on Douglas Island—

The COURT.—So far as this case is concerned, we will suspend for ten minutes.

(Whereupon a recess was had for ten minutes.)

Q. Now, Mr. Bradley, I will ask you to explain in a general way the plan of operation adopted and confirmed by you in 1909 and upon which you have since been working, so as to show the use to which the water was to be put?

A. I will have to repeat.

Q. I want you to explain, Mr. Bradley, the character of the mill, the size of it, the method of conveying the water to the mill, and the use of it at the Gold Creek tunnel to drive the compressor, and all those various things—tell it in your own way?

A. I answered that part, but I will repeat. The Gold Creek tunnel goes into the vein and under cuts the ore bodies at that level—the ores are stoped at that level, hauled [321—171] through the tunnel, around the tramway on the hillside bordering the Jualpa Basin, then around the hillside on the north side of Gastineau Channel. The flume line from Gold Creek was built along with the tramway for economy in construction. The water was to be used, first, on the small compressor used for driving the tunnel, and thereafter the water was to be used—

(Testimony of F. W. Bradley.)

Q. That tunnel—you mean Gold Creek tunnel?

A. Gold Creek tunnel; thereafter the water was to be used in the milling plant.

Q. Where was the milling plant to be situated?

A. On the north side of the hill bordering Gastineau Channel.

Q. What was to be the size of the milling plant when completed?

A. The milling plant has been laid out to consist of four units of 150 stamps each, the contemplated tonnage per stamp being 20 tons per day.

Q. Now, then, as to the stamps, Mr. Bradley, what other apparatus does this mill contain for the purpose of crushing the rock?

A. There is the usual rock breakers in the rock house, followed by some apparatus for sorting out ore; the ore continues on to the ore bins, is crushed in the stamps; the slimes are taken out and assorted, and what there is of a certain size runs over the concentrators, and the apportioning of ores is made there; then the tailings from these tables, that is, the coarse part of the pulp, goes into the Chilean mills there, and it is ground up to a sheer fineness, and the is retreated below, and goes from the plates to the final tables, there taking out the concentrates.

Q. Does the installation of the Chilean mills and their grinding apparatus increase the stamps very much?

A. That works it up to 20 tons per stamp per day.

Q. About 12,000 tons per day? [322—172]

(Testimony of F. W. Bradley.)

A. 12,000 tons per day; yes.

Q. Now, so that the Court may understand the capacity of such a plant, I wish you would explain, with reference to other milling plants, how large that plant is—such a plant.

A. Would be a little more than twice the capacity of the Douglas Island milling plant.

Q. That is, the Treadwell plant? A. Yes.

Q. Which are now considered to be among the largest in the world? A. Yes.

Q. Now, you are familiar with the quantity of water that has been diverted from Gold Creek, are you? A. I am.

Q. And conveyed to the milling plant?

A. I am.

Q. Do you know when the water was first applied at the milling plant—you were not here when the water was first applied to the Gold Creek compressor, were you? A. I was not.

Q. Were you here when the water was first applied to the milling plant? A. Yes, sir.

Q. In the spring of what year? A. Last year.

Q. Spring of 1913?

A. Yes,—I mean a year ago—in the spring of 1913.

Q. Now, explain to the Court, Mr. Bradley, the necessity for the quantity of water diverted in connection with your operations—whether you need all the water diverted or only part of it?

A. In the course of crushing that has been described, the [323—173] amount of battery and wash water is 15 tons of water per ton of ore; the

(Testimony of F. W. Bradley.)

flume has a carrying capacity of 48 cubic feet per second; that will yield 11 tons of water per ton of ore, and in the final capacity of the milling plant the flume will not carry sufficient water, and we will have to repump a certain amount of water in certain parts of the mill.

Q. That only includes water for battery and concentrating purposes, and other like purposes, exclusive of power?

A. It is simply for the milling of the ore—crushing and concentrating.

Q. And does not take into consideration power that may have to be secured elsewhere?

A. That will have to be gotten from some other source.

Q. How far has your construction work progressed at present, Mr. Bradley?

A. We have 40 stamps completed and in operation, and 10 more building; we have one Chilean mill in operation, and three more on the way.

Q. Now, as to the development work, driving tunnels, and so forth?

A. That work has been pushed with all possible expedition; we are working all the men and machine drills that we have working faces for, and we have on the way a 40-drill compressor which will be set up by the time more faces are available.

Q. From what time has the work been pushed as fast as it could be—from the commencement of it?

A. I paid the bills right along, and I know there has been a constant expenditure of money, and con-

(Testimony of F. W. Bradley.)

stant work going on all the time.

Q. From August 1, 1910? A. Yes, sir.

Q. Now, what has been done since August 1, 1910, towards carrying [324—174] out the plans—what tunnels have been driven, and so forth, as far as your knowledge goes—you have examined the property lately, haven't you?

A. Yes; I have gone through it.

Q. You have been here every year, every summer, since 1910? A. Since 1900; yes.

Q. Now, just what has been done since August 1, 1910?

A. The Gold Creek tunnel has been driven a distance of 6500 feet, and an upraise to the surface some 800 feet in length has been put in at the end of it; three different tunnels have been run for both the flume and tram; the flume line and tram line are practically completed; and the milling plant that has already been described is under way.

Q. Have other buildings been built for use in connection with your completed milling plant?

A. Yes; wharf, warehouse, change-house, blacksmith-shop, compressor buildings—whatever is necessary in the way of accessories have been built, and anything else that is needed is also being prepared for.

Q. These accessories, Mr. Bradley, are they on the scale of a 40- or 50-stamp mill, or on the scale of the large milling plant?

A. Everything is going in on a comprehensive

(Testimony of F. W. Bradley.)

plan; everything is being added to as it can be utilized.

Q. This plant that is now so far under completion and operation, what is the purpose of its completion?

A. Well, it has helped pay expenses; in a certain sense it is what is called the pilot mill; if we are making any mistakes we will know about it before there is more money expended in the same way; the 150 stamps are to be added to this mill.

Q. This is a part of the first unit?

A. This is part of the first unit. [325—175]

Q. This is built so that when the first unit is completed, this will form a part of it? A. Yes.

Q. It is not an independent mill by itself?

A. No.

Q. What are your future plans, Mr. Bradley, with reference to carrying out the scheme you have been working on—what I mean to ask you is whether you intend to continue it with all possible diligence, or whether you intend to delay construction?

A. No; it is the intention to continue with all possible diligence.

Q. And you will so continue until the entire 12,000 ton milling plant is completed? A. Yes.

Q. I wish you would describe to the Court a little more in detail the manner of getting the ore to the mill, the route that has to be followed, the character of ground along which it is built, so the Court will have a better idea of the immensity of the work and the length of time it will require to carry out such an enterprise?

(Testimony of F. W. Bradley.)

A. We are spending now about \$50,000.00 a month, and that expenditure will have to continue for the next eight months before the present mill with the Chileans mills that are being added, will be completely supplied with ore; that is in the development of the mines.

Q. That is not what I have reference to, Mr. Bradley; what I mean is the method of conveying the ore—

A. I am coming to that part of it; this expenditure contemplates a shorter line of haul than over the present tram route; the approximate tonnage over the present tram is [326—176] 600 tons, and so in getting more tonnage we have to get it either by double track in the tunnel or running a sea level tunnel; a sea level tunnel is contemplated for that purpose, and work on that has been started and will be continued, but there is no necessity to rush it, because the mine can only be opened up as fast as places can be made open for working the machine drills, and so it will require several years to work it up to 6000 tons per day capacity, and several years after that to work up the ultimate capacity.

Q. Now, what I want is this, Mr. Bradley: I want you to explain the route through the Gold Creek tunnel along the hillside and through the number 3 tunnel to the mill—the character of the tramway, the length of it and the route.

A. The Gold Creek tunnel is 6500 feet long, and that is laid with 40-pound rails; leaving the Gold Creek tunnel the tramway is built on trestle work, and about 900 feet on this trestle work we will reach

(Testimony of F. W. Bradley.)

what is called the passing track; that passing track will be the mine working camp; that is, where the compressor building is, and also where the machine drills will be repaired, steel sharpened and all machine work done of that character; then the work proceeds through what is called No. 1 tunnel; then follows some more trestle work; then No. 2 tunnel; then it enters No. 3 tunnel, the tunnel that goes under the ridge of Mt. Roberts; that is some 2400 feet long; the total feet of haulage is about 13,000 feet.

Q. Is there any haulage done over a track, and by means of what sort of locomotion?

A. At present a storage locomotive for the development, and two gasoline locomotives for the outside work. [327—177]

Q. Now, the water flume extends along this same route for some distance, and how does it reach the point of use?

A. It goes through a tunnel underneath Snow Slide Gulch, and it follows the line of the tramway except that at No. 1 tunnel it goes outside, and it does the same thing in No. 2 tunnel, and in No. 3 tunnel the flume goes underneath the tram.

Q. Are you familiar with Gold Creek in the vicinity of the Alaska-Juneau dam?

A. Yes, sir; I am.

Q. And with the character of the ground in and about the vicinity of Snow Slide Gulch?

A. Yes.

Q. Were you familiar with that in August of 1910?

A. Yes; and immediately prior to that time.

(Testimony of F. W. Bradley.)

Q. You are a mining engineer and familiar with mine construction? A. I am.

Q. I will ask you whether flume construction could be carried on there—the work on the flume grade until trails and roads had been built for men to go up on the grade, to be used in connection with the hauling of lumber and supplies?

A. The preparatory work mentioned had to be done before the real work of building a flume could be begun; there had to be a place graded off for the flume, and the lumber had to be delivered along the line of the flume.

Q. Trails had to be built in order to reach the place of work? A. Yes.

Q. Were there any accommodations there for men until the Alaska-Juneau bunk-house was built?

A. No.

Q. What was necessary in that direction before a large crew of men could be placed upon the ground?
[328—178]

A. There would have to be some place for them to have headquarters.

Q. Do you know what the Alaska-Juneau Company did in that direction?

A. Yes; they built a cabin.

Q. Built a small bunk-house? A. Yes.

Q. Now, Judge Winn has asked about some plats that were posted around town at some time a year or so ago—were there ever any plats posted about town for the purpose of selling stock of the Alaska-Juneau Company? A. No.

(Testimony of F. W. Bradley.)

Q. Was there ever any stock of the Alaska-Juneau Company offered for sale? A. No.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. You came up here, I think, in 1910—on July the 18th, didn't you, Mr. Bradley? A. Yes.

Q. Now, I wish you would state, Mr. Bradley, briefly what, if anything, was done looking towards the opening up, developing and mining of this property prior to the year 1910 on any of the plans or schemes that you had contemplated to open it up on before running this Gold Creek tunnel?

A. The work of endeavoring to prove the value of the property and determine whether it was worth working on a large scale or not.

Q. Where was that work confined, to what part of your property, [329—179] and I wish you would indicate it by referring to your Exhibit No. 1 here, and state briefly what had been done prior to the year of 1910?

A. Referring to Exhibit 1, there had been two cross cut tunnels and other cross cut tunnels run in the vicinity of the word "Mine Workings"; and in order to provide facilities for working the ore in case it was encountered in large quantities, we had to make provision for an outlet to Gold Creek at the junction of Gold Creek with Snow Slide Gulch, on the line marked "Gold Creek Tunnel" on the map; and there was also provision made for an outlet to bring the ore to Gastineau Channel.

(Testimony of F. W. Bradley.)

Q. I didn't intend to incorporate in this question what you contemplated to do, Mr. Bradley, but what did you do in the way of development, and so forth?

A. I will eliminate the word contemplate—that is what we did do.

Q. That is what you did do? A. Yes.

Q. Now, this sea-level tunnel that you have marked here "Proposed Extension" on this exhibit, when did you conceive the idea of running that tunnel?

A. That was in 1913; that was in connection with the present milling plant, and the object of having the tunnel, the sea-level tunnel, changed from the original position which is shown by the line of claims to the right-hand side of the line called "Proposed Extension" was for the purpose of bringing the ore out of the sea-level tunnel nearer to the milling plant.

Q. What, if anything, did you do, Mr. Bradley, about running any tunnel along the series of claims that were taken up in this [330—180] long rectangular figure just to the east of the sea level tunnel as marked in this exhibit?

A. A tunnel was started on those claims and sufficient work was done on it to answer for assessment work, and also to answer for the required amount of work in order to secure a patent, a patent on that group of claims; the tunnel also did assessment work for other claims besides that special group.

Q. Was that tunnel run for the sole purpose of doing the assessment work, or was it the commencement of some plan to open up the property at that time?

(Testimony of F. W. Bradley.)

A. That was one of the different ideas of opening up the property.

Q. At that time where did you contemplate building your mill if you had carried out your project?

A. It would have been immediately in front of that long rectangular piece of ground referred to on Gastineau Channel.

Q. That is about how much farther down Gastineau Channel than where you have commenced the building of your mill now—that is, approximately, Mr. Bradley? A. About 1500 feet.

Q. When did you cease work, if you remember, on that tunnel?

A. When we got the ground patented.

Q. When was that? A. About 1905.

Q. Now, you stated something about, Mr. Bradley, in 1899 that some locations had been made toward carrying out some plan of opening up this property—what locations did you have reference to?

A. I have reference to the Colorado, the Wyoming, the Maryland, the Oregon, the Nevada, the Idaho Placer, and others in the [331—181] neighborhood of the junction of Snow Slide Gulch with Gold Creek.

Q. You mean the Oregon you speak of first is the location made by Corbus in 1899? A. Yes.

Q. Now, when you got up here in the spring, or in the month of July, 1910, you found out that the assessment work had not been kept up, didn't you, on the Corbus Oregon claim?

(Testimony of F. W. Bradley.)

A. That was probably discovered; yes.

Q. Do you remember, Mr. Bradley, when you were testifying in the Basin case that you testified that you discovered that when you came up here in July, 1910?

A. I might have done so; yes.

Q. Now, when you came up here in July, 1910, had the Oregon claim been located—the one that was located by Datson, do you remember?

A. I don't remember, but if it had been located before July, 1910, this reference to my testifying about having discovered there had been no assessment work done would not apply, and the chances are I gave no such testimony.

Q. Now, let's see—I have here Volume 4 of Case No. 2155 of the Circuit Court of Appeals—just one of the volumes of the printed record of that case containing the testimony that was given upon the trial in this court. I will ask you if you remember of testifying as follows—Page 1139—in speaking about the location: “Q. Have you stated everything you said to Mr. Kinzie about making these locations in 1910? A. I have. Q. You directed him to go upon Gold Creek and make a location of water at what point? A. At a point that would fit in with our operations. Q. You didn't care where he located that water, whether it [332—182] was on a patented claim or unpatented claim? A. Yes, I did. Q. What particular claim did you expect Kinzie to go up there and make your water location on? A. I didn't instruct him as to what claim to make it on. Q. What claims did you have in your mind that your

(Testimony of F. W. Bradley.)

company had on Gold Creek at that time? A. The Oregon claim, the old Oregon claim under the Corbus location. Q. You didn't know at that time that there had not been a lick of work done on the Corbus claim since 1905, did you? A. I didn't know it until afterwards"—did you answer those questions that way?

A. Yes, I probably did.

Q. "Q. Did you know it before you left here in the summer of 1910? A. I knew it before I left here; yes"—you answered that question that way?

A. Yes.

Q. Then you did know before you left here that the assessment work had not been kept up on the old Oregon claim?

A. Yes; that is not inconsistent with anything that I stated here on the stand.

Q. I am trying to get the facts—did you give Kinzie any instructions about locating the New Oregon claim, under Datson?

A. That would depend on the date of location; if it was located before I got here, probably not.

Q. I am asking you about your memory, Mr. Bradley; I read over some portions of your testimony to refresh your memory—do you remember whether or not you did give Kinzie any instructions about locating the new Oregon claim?

A. I don't remember as to that.

Q. Now, when was it that you and Mr. Kinzie talked over or had [333—183] any plan decided upon in the way of opening up these properties on the various schemes which you have spoken about—

(Testimony of F. W. Bradley.)

when was the first time, I mean, Mr. Bradley?

A. Why, that was always a live subject, Judge Winn; we talked it over every time I was up here in the summer, and it was also followed along by correspondence.

Q. You knew Mr. Kinzie before he came up here, didn't you? A. Yes.

Q. He had been working with you or for you before he came here? A. He had.

Q. Mr. Kinzie spoke about first learning of some plan of opening up this property, which had originated with you, by reason of some report that you delivered to Mr. Kinzie—a particular report before or about the time he came up here, designating the plans under which you intended to open up this property? ..

A. Whatever it was termed would have been in the office files.

Q. And when you came up here in July, 1910, you left here on August 1st?

A. Either the first or the second.

Q. Did you come up on the same steamer with Bent and the people who came here about that time and who were connected with the Ebner property?

A. No.

Q. That is, the Ebner Gold Mining Company's property—were they here when you got here?

A. No.

Q. Do you remember about what time they arrived here, Mr. Bradley?

A. Before I left [334—184]

(Testimony of F. W. Bradley.)

Q. That is, before you left to go south?

A. Yes.

Q. The exact date you don't remember? A. No.

Q. You knew what mission they were coming out here on, didn't you, before they came here?

A. No.

Q. Didn't you hear of them through the newspapers? A. No.

Q. You did know what mission they were on when they came here, however, didn't you? A. No.

Q. Didn't you state before, Mr. Bradley, in Cause 2155 of the Circuit Court of Appeals, the Basin case, that you had noticed through the newspaper of the mission that they were coming here on?

A. No; I don't remember of so testifying.

Q. Well, didn't you testify in that case that you knew they came here in connection with this Ebner property? A. I knew it after they were here.

Q. You don't remember the date of their arrival?

A. No.

Q. It was before the 1st of August, though?

A. They arrived before I left, and I left the 1st of August.

Q. Were you up on this property at any time during your trip here at that time when the Bent party was up there?

A. I might have been, I don't remember.

Q. Do you remember of seeing them up there at any time?

A. No; I am pretty sure I didn't see them up there.

(Testimony of F. W. Bradley.)

Q. You knew they were going back and forth from Juneau up there right along, didn't you, while you were here—a part of the [335—185] time?

A. I must have known it; yes.

Q. Now, Mr. Bradley, have you ever measured with any certainty the capacity of your present flume extending from your mill on the beach back up Gold Creek to the dam? A. Yes.

Q. How did you take that measurement?

A. I dropped the tape in and timed it and determined the velocity; I knew the square section of the flume.

Q. Is that a good way to ascertain the amount of water in a flume?

A. That is a good way of guessing at it; yes.

Q. When you say guessing, it is a pretty hard thing to guess at, isn't it?

A. It can be done with a very fine instrument, but that is one way of determining its velocity.

Q. That is a practical way, is it? A. Yes.

Q. Where did you make this experiment on your flume?

A. Between the mouth of the Gold Creek tunnel and the passing track.

Q. The passing track?

A. The passing track, the place where the passing track now is.

Q. How far is that down towards Juneau?

A. From the mouth of the Gold Creek tunnel?

Q. Yes. A. About 900 feet.

Q. At what point?

(Testimony of F. W. Bradley.)

A. It is between the Gold Creek tunnel and a point 900 feet this side of the mouth.

Q. Could you designate more definitely the place, Mr. Bradley?

A. It was cut through a rocky point. [336—186]

Q. It was cut through a what?

A. Rocky point.

Q. Is it the first cut through a rocky point after you leave the mouth of the Gold Creek tunnel coming towards Juneau? A. Yes.

Q. That is where you made the measurement?

A. Yes.

Q. When did you make that, Mr. Bradley?

A. Oh, probably last year or the year before.

Q. You made it while your flume was the same size as it is now? A. Yes.

Q. Has it always been the same size along there?

A. Yes.

Q. Never been altered since it was first constructed? A. No.

Q. In this computation you measured the number of cubic feet or miner's inches—which did you measure?

A. It could be converted into miner's inches; the flume carries about 2,000 miner's inches.

Q. The flume carries 2,000 miner's inches?

A. Yes.

Q. This side of that point where you measured it, Mr. Bradley, are there any other intakes—that is, has your flume any other intakes of water coming down from the hillside—the small streams?

(Testimony of F. W. Bradley.)

A. Yes, a number.

Q. Then, your flume this side of the point where you made the measurement is somewhat larger than it is back up the creek from the point where you made the measurement? A. The same size.

Q. The same size all the way down to your mill?
[337—187]

A. Except in number 3 tunnel and the north portal of No. 3 tunnel.

Q. Then, after it leaves the tunnel, and between the tunnel and your mill, it is the same size as it is from the Gold Creek tunnel down to the point where you made the measurement?

A. Generally speaking it is the same size; there may be a little variation, but the carrying capacity I have intended to be the same throughout.

Q. What amount of water do you estimate that you take in from other streams than Gold Creek into your flume?

A. Well, it depends on what water there is at the time; if the flume is full of water from Gold Creek, the water from the side streams is wasted.

Q. Have you ever made an estimation as to what amount of water you could derive from those streams, other than Gold Creek?

A. Yes; I know in the winter time we couldn't get any.

Q. In the winter time you couldn't get much out of Gold Creek, could you?

A. We could get some; yes.

Q. Have you ever experimented sufficiently, Mr.

(Testimony of F. W. Bradley.)

Bradley, to tell how long about on an average each year you could get water enough out of Gold Creek to fill your flume to its capacity of about 2,000 miner's inches?

A. I think some seasons it would last for seven months, and other seasons it might not last longer than five months—that is, to fill the flume to its full capacity without interfering with the prior rights lower down on the creek.

Q. This flume of yours, where it diverges from Gold Creek—no, I will not say where it diverges from Gold Creek, but from the dam which your company has constructed on Gold Creek, [338—188] about what distance down the creek is it to the mouth of the creek?

A. From that point to the mouth of the creek, I guess, is two miles.

Q. Then, your diversion of the water from the Gold Creek dam of your company would, when there was no more water in Gold Creek than to fill your flume to its capacity, leaves the remaining part of Gold Creek dry down to its mouth, except what water came into Gold Creek between its mouth and your dam?

A. If all the water flowing in Gold Creek was taken out by our flume, all the water that would be below our flume would be what would come in from the side streams.

Q. Now, leaving out the question, Mr. Bradley, that you might deprive somebody else of some water that has the same rights, between your dam and the

(Testimony of F. W. Bradley.)

mouth of the creek how many months out of the year do you think Gold Creek would supply your flume to its full capacity, 2,000 miner's inches?

A. Gold Creek can supply everybody for five months in each year.

Q. Now, singling out yourselves alone and taking it for granted you are getting the full capacity of your flume, how long do you think that could be supplied, leaving out the question of any other water rights whatever?

A. In favorable seasons, as I said before, I think we could have seven months of full capacity, and full capacity for other people.

Q. Then, you think there would be five months out of the year that all parties who may have water rights could be supplied to the full extent that they have appropriated at the present time?

A. The records all show that the longest floods do last for about five months, each year, and during that five months there would be ample water for everybody. [339—139]

Q. Now, then, Mr. Bradley, there must be more water going into your flume from your intake on Gold Creek than 2,000 miner's inches, isn't there?

A. Probably at the head, yes; that is on a steep grade and has a greater carrying capacity than the point where I measured it.

Q. The water, then, that you have been using for some months past in the mill, and the overflow which is indicated on Defendant's Exhibit "A" for identi-

(Testimony of F. W. Bradley.)

fication, is more water than 2,000 miner's inches, isn't it?

A. No; that is about the limit of the carrying capacity of the flume, Judge.

Q. Is it? A. Yes; the way I measured it.

Q. Then, there must be some considerable overflow in you flume at different points by reason of this additional water that is coming in other than the Gold Creek water, isn't there?

A. The head of the flume down to the little compressor that was used for running the Gold Creek tunnel, that portion of the flume carries much more water than the portion from the mouth of Gold Creek tunnel to the mill site, and when the said streams are in flood we have got them all turned into the flume, in order to hold our right to them; we have been allowing them to run into the flume and then to go out again.

Q. So I understand you to say, Mr. Bradley, that the flume between the Gold Creek tunnel and the dam is of greater carrying capacity than it is from the Gold Creek tunnel down to where you made your measurement?

A. Yes, that portion of it is on a steeper grade than the balance of the tunnel, although it is the same size flume. [340—190]

Q. At the present time since you have commenced operating the new mill, you have been hauling all grades of ore from the new Gold Creek tunnel down to your new mill—now, what distance is that, did you say, Mr. Bradley?

(Testimony of F. W. Bradley.)

A. From the mouth of Gold Creek tunnel to the new mill?

Q. Yes. A. About 6,500 feet.

Q. Is that following the line of your railroad track? A. Yes.

Q. And on a straight line it would be decreased—you make some considerable curves, don't you?

A. Yes.

Q. Now, talking about those little streams, Mr. Bradley, that feed your flume line other than Gold Creek—about what length of time during each season do you get any water from that source?

A. Oh, I presume they would be in flood for five months, whatever their full capacity is, I don't know that; I have never had occasion to determine that.

Q. Well, how long during the season do those streams furnish or feed your flume with any water?

A. Why, of course, it would be five months.

Q. You don't think you could get any water from that source any more than five months out of the year?

A. Not to speak of; there might be just a little rivulet.

Q. What are those streams called, Mr. Bradley, that you get the water from?

A. I think they are called Wood's Gulch or Wood's Ravine, and branches of it.

Q. You don't have any idea how much water you get from that source, say for about five months out of the year?

A. I presume for five months in the year all that

(Testimony of F. W. Bradley.)

we get from [341—191] the other streams might fill one-fourth of the capacity of the flume—that is a rough estimate.

Q. Wood's Gulch stream is quite a stream for some portions of the year, isn't it?

A. Yes; that gets in flood sometimes, but I noticed since I have been here this year that one of the branches dries up very quickly.

Q. What branch?

A. That is one at the north portal of our No. 3 tunnel.

Q. At your No. 3 tunnel? A. Yes.

Q. Are those the only streams that could be of any advantage in feeding your flume?

A. The Snow Slide Gulch, there is some water in that.

Q. Quite a little bit of water in that at certain seasons of the year, isn't there?

A. Yes; when the snow is melting.

Q. For about how long each year do you get any water out of that?

A. I think the five months flood period applies to that too.

Q. Do you know about how much water you get from that source?

A. I think it is—well, half of what Wood's Gulch gives.

Q. About what portion, say during five months out of the year, would that go towards filling your flume?

A. That would come in with the bunch of side

(Testimony of F. W. Bradley.)

streams; and the whole bunch of side streams might possibly fill it to one-quarter capacity during five months of the year.

Q. Don't you think there is more water than that?

A. Five months is a long time, Judge.

Q. On some days there is more than that, isn't there?

A. On some warm days when the snow is melting, yes. [342—192]

Q. But you were taking an average when you were testifying a while ago? A. Yes.

Q. Prior to the year 1910, Mr. Bradley, what work, if any, to your knowledge had been done on the Colorado claim and in or on the Oregon claim?

A. There had been sufficient work done to patent the group.

Q. You didn't patent the Oregon, did you?

A. No.

Q. The work that had been done prior to 1910 was simply work sufficient for the patenting of the group of what claims?

A. Well, there was the Colorado, Nevada, Maryland I think in the group that was patented.

Q. What did that work consist of, Mr. Bradley?

A. Tunneling work.

Q. Done on each claim or on some particular claim?

A. No; I think it was done practically at one point.

Q. What point was that, do you know?

A. Near where the Gold Creek tunnel starts.